Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

CARYN VOSKUIL,

Petitioner

v.

ENVIRONMENTAL HEALTH CENTER-DALLAS

On Petition For Writ Of Certiorari
To the Court of Appeals for the Fifth Circuit

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80 pp

INTRODUCTORY STATEMENT

Petitioner filed suit in March, 1996 against her employer, Environmental Heath Center-Dallas, ("EHC-D") alleging among other things discrimination under Title VII with damages to be calculated under 42 U.S.C. §1981a. Petitioner, who had been seeing a psychotherapist prior to her employment was the subject of continuous sexual harassment at the hands of her supervisor.

Respondents demanded production of Petitioner's psychotherapist's notes. Petitioner claimed a psychotherapist-patient privilege. The Magistrate Judge, after *in camera* inspection relied upon an unpublished Magistrate's opinion from the Eastern District of Pennsylvania as authority (but improperly interpreted it), and ordered production of the notes. Petitioner appealed to the District Court Judge, but was ultimately ordered to produce the documents and charged a monetary sanction. The court's order indicated that the failure to either pay or produce the documents would result in dismissal with prejudice. Not having the funds to pay the sanction, and not desiring to moot the issue, Petitioner permitted a contempt sanction to be entered in order to challenge the ruling on appeal.

QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE COURT RESOLVE THE CONFLICT BETWEEN THE CIRCUITS REGARDING WHAT CONSTITUTES A WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER *JAFFEE V. REDMOND*?

II. ASSUMING THAT THE MAGISTRATE JUDGE AND THE DISTRICT COURT JUDGE HAVE ERRONEOUSLY INTERPRETED WHAT CONSTITUTES A WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER *JAFFEE* AND ITS PROGENY AND AS A RESULT REQUIRED A PARTY TO PRODUCE DOCUMENTS FOR WHICH THE PRIVILEGE WAS PROPERLY CLAIMED, UNDER PENALTY OF DISMISSAL, WOULD THOSE RESULTANT ORDERS AND SANCTIONS BE AN ABUSE OF DISCRETION?

III. DOES A LEGALLY JUSTIFIED PARTY "FLOUT" THE COURT'S ORDER WHEN THE PARTY RESISTS PRODUCTION OF PRIVILEGED DOCUMENTS AND ATTEMPTS TO SEEK APPELLATE REVIEW UNDER THE *COBBLEDICK* DOCTRINE?

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IN THE
SUPREME COURT OF THE UNITED STATES

CARYN VOSKUIL,
Petitioner

v.

ENVIRONMENTAL HEALTH CENTER-DALLAS
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Caryn M. Voskuil respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 19, 2000 in its affirming the decision and orders of the Court for the Northern District of Texas.

Caryn Voskuil petitions this Court for Writ of Certiorari on issues of whether the district court erred in its interpretation and application of the rule in Jaffee and its progeny; improperly dismissed Petitioner's action with prejudice due to its improper interpretation and application of the rule *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct 1923, 135 L.Ed.2d 337 (1996) and its progeny; and in improperly determining that Petitioner's actions in resisting production of privileged documents was not legally justifiable.

OPINIONS BELOW

The decision of the Court of Appeals *in Voskuil v. EHC-D*, 99-10886 (Appendix ("A"), A:40-42) is unreported. The rulings of the district court in *Voskuil v. EHC-D*, 3:96-CV-0683-L (A:1-13; A:14-15, A:17-28; A:30; A:34-38) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1); the judgment of the Court of Appeals was entered on June 19, 2000(A:40-42); Petitioner's timely petition for rehearing was denied on July 24, 2000 (A:43); On October 17, 2000, this Court granted Petitioner's request for an extension of time to file its application for writ of certiorari, requiring the application to be filed on or before December 21, 2000.

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STATEMENT OF THE CASE

I. Petitioner's Facts Statement

Petitioner filed a lawsuit against her employer alleging, among other things, violations of 42 U.S.C. §2000e et seq. ("Title VII",) and requesting damages as they are set out in 42 U.S.C. §1981a.

Petitioner had been seeing a psychotherapist since before her employment with EHC-D. However, soon after her employment began, Petitioner was continuously subjected to requests for dates by her supervisor, Rick Sellers. He made constant sexually explicit comments, disseminated pornographic faxes, and subjected her to unwanted offensive physical contact by running his hand along her body, and as she sat at her desk working he would run his fingers along the nape of her neck and administer unwanted neck massages. Despite Petitioner's protestations the behavior continued.

Petitioner, a Fulbright scholar, and MBA charged with the resolution of Human Resources issues for her employer, became depressed as a result of the abuse and her inability to stop the actions of her supervisor. She discussed the situation with her family and her psychotherapist. Ultimately Petitioner became so upset with the situation that she had suicidal thoughts. She thereafter took a personal leave under the Family and Medical Leave Act.

Upon her return from leave, Petitioner was demoted and given reduced hours. She could not support herself on the reduced hours and after several unheeded requests to return her to full-time status, she was forced to leave.

II. Proceedings below

On March 8, 1996, Petitioner, filed a lawsuit against her employer, Environmental Health Center-Dallas ("EHC-D.") The action included Title VII claims of sexual harassment, creation of a hostile work environment and retaliation, along with a claim for violation of the FMLA, pendent state claims for assault and for intentional infliction of emotional distress.

On December 2, 1996 Petitioner moved to amend her pleadings removing her tort claim for intentional infliction of emotional distress. On the same date, Respondent moved to compel a mental examination of Petitioner. On January 6, 1997 Respondent moved for Summary Judgment. On January 8, 1997 the Court granted Petitioner's Motion to Amend its Complaint and Respondent's motion to Amend its Answer. On August 18, 1997 the District Court Judge (Judge Sidney Fitzwater) granted in part and denied in part Respondent's Motion for Summary Judgment. Although there was neither an independent claim for emotional distress nor any medical issue before the Court which might give rise to access to Petitioner's medical records, Respondent continued to seek production of Petitioner's medical records.

On October 3, 1997, the Magistrate Judge granted Respondent's Motion to compel production of Petitioner's medical records. Petitioner objected and moved to set aside the Magistrate's order. On May 6, 1998 the District Court Judge (Judge Sidney Fitzwater) granted Petitioner's Motion to Set Aside and ordered *in camera* inspection of the privileged documents.

After the *in camera* inspection of Petitioner's medical records and briefing pursuant to the May 6, 1998 Orders the Magistrate Judge, on June 25, 1998 ruled that Petitioner had placed her mental condition "at issue" without any finding that Petitioner's claim or Respondent's defense either explicitly relied upon the

existence or absence of the communications for which the psychotherapist-patient privilege was claimed, or that the documents bore "directly on the truth of the claim." The Magistrate Judge relied upon an unpublished case, *Lanning v. SEPTA*, 1997 Westlaw 597905 at 2, quoting *Thorne v. Universal Properties, Inc.*, 1987 Westlaw 7683 at 2, E.D.Pa, as controlling authority). The Magistrate found the information to be merely "relevant," but not relevant as to any particular element of a claim before the Court.

Petitioner filed its Objections to the Magistrate's Order on July 20, 1998. On February 24, 1999, Judge Lindsay (to whom the case was transferred in September 1998) overruled Petitioner's objections and "affirmed the Magistrate Judge's order in all respects" and required production of Petitioner's records. On March 22, 1999 Petitioner provided Respondent with Petitioner's psychotherapist's assertion of privilege as to the psychotherapist's confidential notes taken in the process of diagnosis and treatment.

On April 23, 1999 a hearing was held on Respondent's Motion for sanctions and continuance. The District Court Judge Lindsay indicated that Petitioner's action would be dismissed if she did not agree to the produce her privileged medical records and that Petitioner would be ordered to pay monetary sanctions to Respondent for having failed to provide Respondent with copies of her psychotherapist's confidential notes for which she had consistently claimed a privilege. On June 11, 1999 the District Judge filed an Order denying Petitioner's Motion for Protective Order against disclosure, ordering that Petitioner provide its privileged documents to Respondent by June 22, 1999 and additionally ordering the payment of over $7,500.00 to Respondent by the 11th of July, 1999. The June 11, 1999 Order for the first time also provided minimal limitation on disclosure although Petitioner had requested protection and limitation on disclosure as early as

December 15, 1997; and again on January 15, 1998.

On June 21, 1999 Petitioner filed its Motion for Stay pending application for Mandamus, noting that the production of the documents would be a futile gesture considering that neither Petitioner nor Petitioner's counsel had in excess of $7500.00 (either in tandem or individually) to give to Respondent on or before July 11, 1999. Petitioner did not desire to moot the issue for appeal and according to the Court's Order, failure to comply with either deadline (production of the documents or payment of the sanction) would result in Petitioner's case being dismissed with prejudice.

On June 23, 1999 the District Court Judge denied Petitioner's Motion for Stay. On July 1, 1999 the District Court Judge entered an order and judgment dismissing Petitioner's cause of action with prejudice. Petitioner thereafter perfected her Appeal to the Fifth Circuit Court. The Fifth Circuit Court affirmed the District Court orders, and Petitioner has filed this application for Writ for Certiorari.

CONSIDERATIONS FOR ALLOWANCE OF WRIT

Supreme Court Rule 10 states that a petition will be granted only for compelling reasons. The errors in interpretation committed by the District Court and sanctioned by the Court of Appeals are such a departure from the spirit of the rule announced in *Jaffee* and its progeny as to call for an exercise of this Court's supervisory power. Further, the conflict between the Circuits as to what constitutes a "waiver" under *Jaffee* requires settlement by this Court.

In the Court below, Petitioner maintained actions under 42 U.S.C. §§ 2000e - 2000e-16. ("Title VII") and requested calculation of damages less than

42 U.S.C. § 1981a. Case law establishes that 42 U.S.C. § 1981a is a method of calculating damages, and not a substantive claim for damages.[1] However, the Magistrate Judge improperly determined that Petitioner had waived her privilege to documents created by her psychotherapist for the purpose of diagnosis and treatment (*See* Jaffee *v. Redmond, 518 U.S. 1, 116 S.Ct 1923, 135 L.Ed.2d 337 (1996)*), because she requested damages as set out 42 U.S.C. §1981a and alleged facts that evidenced a period of emotional distress, even though no independent claim for emotional distress existed in Petitioner's pleadings.

I. SHOULD THE COURT RESOLVE THE CONFLICT BETWEEN THE CIRCUITS REGARDING WHAT CONSTITUTES A WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER *JAFFEE V. REDMOND*?

The Magistrate Judge's opinion hereinbelow states that the doctrine of "sword and shield" applies to Petitioner's privileged psychotherapist's notes. After the *in camera* inspection of Petitioner's medical records, on June 25, 1998, the Magistrate ruled that Petitioner had placed her mental condition "at issue."

In *In Re Burlington, 822 F.2d 518, 533 (5th Cir. 1987)*, the Fifth Circuit Court noted when finding that

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[1] *See e.g. Ferry v. Roosevelt Bank, 883 F.Supp. 435, 442 (E.D. Mo. 1995)* wherein the Court indicated with respect to an ADA claim that 42 U.S.C. § 1981a does not provide independent grounds for relief, but, simply sets forth the remedies available and defenses to claims for damages..." *See also, Presutti v. Felton Brush, Inc., 927 F.Supp 545, 550 (D. N.H. 1995)* wherein the District court of New Hampshire found that 42 U.S.C. § 1981a was not intended to stand alone as an independent cause of action... and after summary judgment with respect the Plaintiff's claim there was no substantive act, as required in § 1981a to form the basis for unlawful intentional discrimination.

a party had not put its attorney/client privilege and work product "at issue" that "[T]his is not a case in which a party has asserted a claim or defense that *explicitly relies on the existence or absence of the very communication for which he claims a privilege." citing United States v. Woodall, 438 F.2d 1317, 1324-26 (5th Cir. 1970) cert. denied, 403 U.S. 933, 91 S.Ct 2262, 29 L.Ed 2d 712 (1971).* By analogy, Petitioner has not relied upon the existence or absence of her psychotherapist's notes in advancing her claim. She neither relies upon the psychotherapist's documents, testimony nor her diagnoses to advance her claim. Therefore, under reasoning asserted in *In re Burlington Northern*, the psychotherapist's documents were not "at issue."

The attorney-client privilege law is specifically mentioned in Jaffee at 1928 when determining the establishment of the federal psychotherapist-patient privilege under Fed.R.Evid. 501. Even reliance upon attorney-client privilege law in defining the parameters of the psychotherapist-patient privilege has become a hallmark of waiver inquiry. *See e.g. In re Grand Jury Proceedings (Gregory P. Violette), 183 F.3d 71, 75 (1st Cir.1999),* applying the crime-fraud exception to psychotherapist-patient privilege*; Vinson v. Humana Inc., 190 F.R.D. 624, 626 (M.D.Fla.1999),* a Title VII and ADA case citing *Hucko v. City of Oak Forest, 185 F.R.D. 526, 529 (N.D.Ill. 1999)* agreeing that principles of implied waiver in attorney-client privilege context should govern the implied waiver of the psychotherapist-patient privilege*; Vanderbilt v. Town of Chilmark, 174 F.R.D. 225,229 (D.Mass.1997)* discussing the analogy of the psychotherapist-patient privilege to the attorney-client privilege; *Santelli v. Electro-Motive, 188 F.R.D. 306,308 (N.D.Ill.1999);* analogizing the attorney-client privilege with the psychotherapist-patient privilege*).* These views which purport to be guided by implied waiver in the attorney-client privilege context offer more consistency because

they are based upon a definite standard. The rule as described by the Magistrate judge below is not based in well-established caselaw and as a result, produces an outcome that is inconsistent with current cases on the issue, which do not find waiver where there is no independent claim for emotional distress.

Even if one accepts the applicability of the unpublished cases upon which the Magistrate Judge relies for precedential weight, i.e., *Lanning v. SEPTA, 1997 Westlaw 597905 at 2, quoting Thorne v. Universal Properties, Inc., 1987 Westlaw 7683 at 2, E.D.Pa,* one must accede that the ruling was in error. After review of the documents *in camera*, the Magistrate merely found the information in Petitioner's psychotherapist's notes to be "relevant." However, Fed.R.Civ.P. 26(b)1 concedes that privileged information may be "relevant." The Magistrate Judge's order does not establish that the documents were themselves interposed in the litigation such that they bore directly on the truth or falsity of the claim. Without such a finding, there could be no determination that Petitioner's raising the issue of privilege against disclosure was a violation of the sword and shield doctrine. Petitioner had no independent claim for emotional distress damages before the Court, therefore Petitioner has not affirmatively placed her mental condition "at issue." Respondent had only defended on the grounds of business necessity and never raised Petitioner's mental or emotional capacity as a concern in the litigation. The Magistrate Judge and the Respondents had agreed that all that was left for the Court to determine was a "plain vanilla" Title VII action. Therefore, no grounds existed for the Magistrate Judge's determination that Petitioner had waived her privilege under the sword and shield doctrine.

In *Sabree v. United Brothers of Carpenters & Joiners, 126 F.R.D. 422 (D.Mass 1989)*, the plaintiff alleged discrimination on the basis of race and

requested state law damages for, among other things, emotional distress. The Court therein found no exception to the (Massachusetts) psychotherapist-patient privilege. The Court indicated that the Plaintiff "has not placed his mental condition *at issue*. *Sabree* makes a 'garden variety' claim of emotional distress, not a claim of psychic injury or psychiatric disorder resulting from the alleged discrimination." Similarly, Petitioner does not allege severe, ongoing emotional distress. Nor does Petitioner attribute any psychological disorder to Respondent's action beyond the depression felt as a result of being sexually harassed, and discriminated against. Petitioner makes a "garden variety" claim of discrimination and does not have to prove emotional distress as an element of her prima facie case. Therefore neither her emotional nor mental state are "at issue."

In *Jennings v. D.H.L. Airlines, 101 F.R.D. 549 (N.D. Ill, 1984)*, a case on point with the case at bar - though prior to the 1991 amendments of 42 U.S.C. §1981a, the Plaintiff alleged sex discrimination and sexual harassment under Title VII (42 U.S.C. §§ 2000e - 2000e-16). In *Jennings* at 551, the Court opined with respect to Standard § 504:[2]

> If the plaintiff here claimed that the condition of employment which the defendant's conduct affected on the basis of her sex was her psychological well-being, then the plaintiff's emotional state would be directly in issue. The exception to the proposed rule 504 for elements of a claim would be satisfied. Plaintiff however, makes no such claim.

In *Jennings*, the Plaintiff's psychological records

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[2] Supreme Court Standard § 504 (d)3 (in relevant part): There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense..."

were determined to be privileged and not discoverable. Her filing of a "garden variety" sexual harassment claim did not place her mental state "in issue." Similarly, Petitioner has alleged sexual harassment, sex discrimination and retaliation. The conditions of employment which are the focus of this action are primarily the creation of a hostile work environment by the proliferation of sexually obscene materials and sexually explicit discussions in the office, the termination of Petitioner's position once she complained to the EEOC, reassigning her job duties to a male, demotion, and failure to return Petitioner to full-time status. These issues do not set forth a claim for "injury to emotional well-being" as contemplated in *Jennings*. The *Jennings* case *supra* is specific in its holding that a Title VII claim, in itself, does not place plaintiff's emotional state "directly in issue." Petitioner also cited *Bottomly v. Leucadia National, 163 F.R.D. 617 (D. Utah 1995)*, a case on point with the case at bar, as it was also a sexual harassment case where a defendant's global request for mental health records was denied.

Developing caselaw focuses on the two divergent views with regarding the psychotherapist-patient privilege. *Speaker Ex Rel. Speaker v. County of San Bernadino*, 82 F.Supp.2d 1105, 1118-1120 (C.D.Cal. 2000), the California District Court discusses the waiver of the psychotherapist-patient privilege in terms of a broader and narrower view. *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127 (E.D.Pa 1997), *Vann v. Lone Star Steakhouse & Saloon of Springfield, Inc.*, 867 F.Supp. 346 (C.D. Ill.1997) are said to represent the broader view, *while Vanderbilt v. City of Chilmark*, 174 F.R.D. 225 (D.Mass.1997) and *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D.Cal. 1999) are said to represent the narrower view. . *See also Jackson v. Chubb Corporation, 193 F.R.D. 216 (D.N.J. 2000)* discusses the standards and attempts to distinguish the "broad view" from the "narrow view." However,

even these cases differ in their approaches to how they arrive at their conclusions. Reliance upon unpublished cases for authority and vain attempts to fashion a rule adhering to the spirit of *Jaffee*, and giving deference to Standard 504 throughout the Circuits, has led to the widely varying applications which *Jaffee* sought to avoid.

In the instant case, the Magistrate Judge's attempt to fashion a rule made from unpublished cases and Standard 504 was inaccurately conceived, then improperly applied. The resulting orders compelling disclosure of documents for which a privilege was properly claimed and issuing sanctions for attempting to protect the privileged documents are such a departure by the lower court as to require intervention by this Court.

II. ASSUMING THAT THE MAGISTRATE JUDGE AND THE DISTRICT COURT JUDGE HAVE ERRONEOUSLY INTERPRETED WHAT CONSTITUTES A WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER *JAFFEE* AND ITS PROGENY AND AS A RESULT REQUIRED A PARTY TO PRODUCE DOCUMENTS FOR WHICH THE PRIVILEGE WAS PROPERLY CLAIMED, UNDER PENALTY OF DISMISSAL, WOULD THOSE RESULTANT ORDERS AND SANCTIONS BE AN ABUSE OF DISCRETION?

The Northern District of Texas has thoroughly set out the standards for reviewing a Magistrate's orders in *Lahr v. Fulbright & Jaworski, 164 F.R.D. 204, 208 (N.D.Tex. 1996)* stating:

> The clearly erroneous standard applies to the factual components of the magistrate's judge's decision. The district court may not disturb a

> factual finding unless, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed... The magistrate judge's legal conclusions are freely reviewable. The district judge applies a *de novo* standard, and reverses if the magistrate judge erred in some respect in her (his) legal conclusion... In prior decisions, the court has held that an abuse of discretion standard applies to certain aspects of magistrate judge rulings. Nothing in Rule 72(a) forbids application of this standard of review or suggests that this measure is inappropriate when analyzing those aspects of a magistrate judge's decision that are vested in her (his) discretion.

Judge Lindsay's Order of February 24, 1999 fails to indicate that a *de novo* review was performed with respect to the magistrate judge's legal conclusions. In *Bennett v. Caster Service of N. Gordon Co., Inc., 976 F2d 995, 998 (6th Cir. 1992)* the Sixth Circuit Court of appeals addresses its jurisdiction (with respect to a Rule 11 claim) after the District Court failed to make proper review of a Magistrate's order, noting, "Under 28 U.S.C. § 1291, this court has jurisdiction of appeals from final decisions of district courts. Here because the district court did not undertake the appropriate *de novo* review of the magistrate judge's 'order,' there could be no final, appealable decision by the district court. Therefore we lack jurisdiction over this appeal."

Bennett raises concern as to whether the Courts of Appeals have jurisdiction of a matter when the District Court Judge has not performed proper review of a magistrate's ruling. In the current action, it appears from the face of the Order that the District Court Judge failed to perform a *de novo* review of the

issues[3] as required by the compulsory provisions of Fed.R.Civ.P. 72(a), which would be clear error requiring reversal and remand to the District Court for *de novo* review.

Unlike the Defendant in *McCleod, Alexander et al v. Quarles, 894 F.2d 1482, 1486 (5th Cir. 1990)*, that based his failure to produce documents on "summary objections," Petitioner resisted discovery only as to as to one specific category of documents, i.e., the handwritten documents of her psychotherapist, which were made for the purpose of treatment and diagnosis. Petitioner's objections to production under the psychotherapist- patient privilege were supported by extensive research. The record reveals that Petitioner produced all other nonobjectionable categories of documents requested by Respondent and Petitioner utilized every method determined proper under the Federal Rules and case law of precedential weight to protest the lower court rulings.

Even in cases where the party's conduct has been particularly egregious, the Fifth Circuit Court has determined that the dismissal sanction under Fed.R.Civ.P.37 is not the least onerous sanction, which would address offensive conduct. In *Gonzalez v. Trinity Marine Group, 117 F.3d 894, 898 (5th Cir. 1997)* this Court states that dismissing a case with prejudice is a harsh sanction but that it will be upheld unless the district court has abused its discretion. The sanction is to be "confined to instances of bad faith or willful abuse of the judicial process." Additionally, the court is bound to impose the least severe sanction available." *Id. at 898.* The offending party in *Gonzalez* fabricated evidence and gave false testimony at a hearing. Petitioner herein has merely utilized the proper procedures of the Federal Rules of Civil Procedure and applicable caselaw to bring an issue of an improper ruling to the attention of the Court.

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[3] See Appendix p 14

It cannot be said that Petitioner's conduct amounted to a willful abuse of the judicial process or bad faith such that the dismissal sanction was proper. It is clear from the record that the District Court Judge did not consider any other sanction, and in fact indicated during the April 23, 1999 hearing that he was not required to consider the least onerous sanction.[4]

The District Court Judge however, issued an order giving Respondent and any person Respondent chose to call as witnesses, access to Petitioner's privileged documents; these witnesses would include the party that harassed Petitioner as well as co-workers or any person Respondent decided to call as a witness, for any reason. Clearly these "restrictions" were neither fair nor reasonable. Petitioner was placed in the unfortunate position of having to decide whether to place her confidential and privileged documents in the hands of the persons who had caused her the harm that she was seeking to remedy or to suffer contempt as a means of seeking appellate review of the underlying orders.

The decision was effectively made for her. The District Court Judge ordered Petitioner and Petitioner's counsel to pay Respondent in excess of $7,500.00 as sanction for failing to produce the privileged documents. This determination was made even though Petitioner's position in resisting production of the documents was legally justifiable.

Petitioner has argued hereinbelow that the failure to respond to discovery does not *de facto*

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[4] Petitioner, intimidated and under duress from the District Court Judge stated that she would produce the documents subject to fair and reasonable restrictions, i.e., equivalent to those proposed by the District Court Judge in *Jaffee v. Redmond supra.*, whereby only the attorneys and experts were provided access to the privileged documentation.

warrant monetary sanction. In *Frazier v. SEPTA, 161 F.R.D. 309,314 (E.D.Pa. 1995)*, the District Court, though denying Plaintiff's second Motion for Protective Order, declined to compel Plaintiff and/or her counsel to reimburse SEPTA for costs and expenses associated with the motion compel as Plaintiff's attorney's objection to being deposed was substantially justified. The Court noted that although Plaintiff's opposition to the efforts to compel his deposition were ultimately unconvincing they were, "not completely without basis in the law." In *Ziemann v. Burlington County Bridge Commission, 155 F.R.D. 497, 507 (D.N.J. 1994)* citing the Advisory Committee notes, the Court indicates, "on many occasions, to be sure the dispute over discovery between parties is genuine, though ultimately resolved one way or the other by the Court. In such cases, the losing party is substantially justified in carrying the matter to Court." The Court therein found that the Plaintiff's response to Defendant's applications was substantially justified, and an award of fees under Rule 37 was inappropriate. Also in *Smith v. Conway Organization, Inc., 154 F.R.D. 73, 78 (S.D.N.Y. 1994)* the District Court declined to impose fees and costs when the Plaintiff did not prevail on the discovery issue, because the objections to discovery were substantially justified.

On June 21, 1999 Petitioner filed its Motion for Stay pending application for Mandamus, noting that the production of the documents would be a futile gesture considering that neither Petitioner nor Petitioner's counsel had in excess of $7500.00 (either together or individually) to give to Respondent on or before July 11, 1999. According to the Court's Order, failure to comply with either deadline would result in Petitioner's case being dismissed with prejudice.

Petitioner's position in resisting production of documents which were clearly covered by a privilege which had not been waived by Petitioner, was legally justifiable and the imposition of monetary sanctions

was an abuse of discretion, especially when considering that the District Court Judge conditioned the maintenance of Petitioner's action in the District Court upon the payment of the improperly sanctioned fees.

Sufficient case law exists to support Petitioner's position that the Magistrate Judge was in error. Petitioner's attempts to bring the existence of the caselaw and arguments to the attention to the Court demonstrate legal justification for resisting production. That Petitioner's position was legally justifiable should have foreclosed the Court's decision to impose monetary sanctions and imposition of those monetary sanctions, should be determined an abuse of discretion.

III. DOES A LEGALLY JUSTIFIED PARTY "FLOUT" THE COURT'S ORDER WHEN THE PARTY RESISTS PRODUCTION OF PRIVILEGED DOCUMENTS AND ATTEMPTS TO SEEK APPELLATE REVIEW UNDER THE *COBBLEDICK* DOCTRINE?

The Court's determination that Petitioner "intentionally disregarded court orders and misrepresented her future course of conduct to the district court" is a misapprehension of the facts. The District Court Judge had not made a determination as to monetary sanctions during the April 23, 1999 hearing. The Court thereafter in its written order, ordered that Petitioner would have to produce its privileged documents to Respondent by June 22, 1999 *and* pay in excess of $7,500.00 to Respondent by July 11, 1999 or have its case dismissed. Petitioner's counsel informed the District Court Judge that neither Petitioner nor Petitioner's counsel, either separately or in tandem had $7,500.00+. The effect of the Court's ruling was therefore, that Petitioner would suffer

dismissal of the action even if Petitioner produced the documents. The monetary sanction was not a *lesser* sanction. It was in fact *the same sanction.* Petitioner's production of the documents would not have resulted in a scenario other than that which ultimately occurred.

Petitioner was required therefore to stand in contempt and receive a final order to seek appellate review of the District Court Judge's determinations. In *Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368, 377, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981)* the Supreme Court held that "when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." The ruling in *Firestone* follows the reasoning in *Cobbledick v. U.S. 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940)* which requires finality in the district court prior to appeal. In the current action, the actual contempt citation ran concurrent with the dismissal with prejudice. Petitioner would either have been constrained to produce her privileged documents, when she was aware that the case would be dismissed 20 days later because neither she nor her counsel (individually or together) had in excess of $7,500.00; or stand in contempt for the purpose of obtaining a final appealable judgment to invoke appellate jurisdiction under 28 U.S.C. §1291. Therefore, the production of the documents would have been a vain act, and a futile gesture at best.

Because Petitioner's position below was legally justifiable, and because proceeding under *Cobbledick*, as explained in *Firestone v. Risjord, supra.* was an appropriate act, this Court should grant this petition for writ of certiorari and determine that a Petitioner does not "flout" the court's orders in such circumstances.

CONCLUSION

The question as to the parameters of a waiver of the psychotherapist-patient privilege has received conflicting treatment in the various circuits, and more specifically in the case below. Certiorari should be granted to resolve these conflicts.

Because the courts hereinbelow improperly interpreted and applied the law regarding waiver of the psychotherapist-patient privilege and Petitioner's ability to proceed under *Cobbledick* as explained in *Firestone v. Risjord*; this Court should grant certiorari to establish the proper interpretation, establish that Petitioner's resistance to the production was legally justified and reverse all orders of the Court that occurred as a result of the improper order.

The petition for writ of certiorari should be granted.

December 18, 2000

_____

Nadine R. King-Mays

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARYN M. VOSKUIL	§	
Plaintiff,	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	
	§	**3:96-CV-0683-D**
ENVIRONMENTAL	§	
HEALTH CENTER	§	**[U.S. DISTRICT COURT]**
- DALLAS and RICK	§	**NORTHERN DISTRICTOF TEXAS**
SELLERS	§	**[FILED]**
individually and as	§	**[JUL - 2 1998]**
a servant of Environ-	§	**[NANCY DOHERTY, CLERK]**
mental Health Center	§	**[By s/_____ deputy]**
of Dallas,	§	
Defendants.	§	**[ENTERED ON DOCKET]**
		[JUL 06 PURSUANT]
		[F.R.C.P. RULES 58 AND 79A]

ORDER

CAME ON for consideration (a) Defendant's Motion to Compel filed on December 2, 1996, and (b) Plaintiff's Motion for Protective Order filed December 17, 1996, both of which were remanded to this Court pursuant to an Order entered May 7, 1998 by Judge Sidney A. Fitzwater, United States District Court for the Northern District of Texas, Dallas Division. The parties appeared by and through their respective attorneys of record and Plaintiff Caryn M. Voskuil appeared in person. The Court, after reviewing the pleadings, motions, and briefs on file, inspecting the documents and tangible things produced by Plaintiff Caryn M. Voskuil, for *in camera* inspection, hearing the arguments of counsel and the commentary of

Plaintiff Caryn M. Voskuil, finds that the Defendant's Motion is well taken and should be granted and that Plaintiff's Motion for Protective Order should be denied. The Court further incorporates herein by reference the findings stated orally and recorded in open court following the presentations of counsel, and commentary of Caryn M. Voskuil.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant's Motion to Compel is hereby granted and Plaintiff's Motion for Protective Order is hereby denied.

IT IS FURTHER ORDERED that Plaintiff shall produce her medical records and related medical documents as requested in Defendant's Request for Production Nos. 10, 19, and 25, including, without limitation, all documents reviewed by this Court *in camera* or listed on Plaintiff's Medical Records Privilege Log filed with this Court on or about May 29, 1998, to the attorneys of record for Defendant Environmental Health Center-Dallas, Inc., Wesner, Coke & Clymer, P.C., Three Lincoln Centre, 5430 LBJ Freeway, Suite 1280, Dallas, Texas on or before July 6, 1998.

IT IS FURTHER ORDERED that Plaintiff shall serve a full and complete answer to Interrogatory No. 14 of Defendant's First Set of Interrogatories to the attorneys of record for Defendant Environmental Health Center-Dallas, Inc., Wesner, Coke & Clymer, P.C., Three Lincoln Centre, 5430 LBJ Freeway, Suite 1280, Dallas, Texas on or before July 6, 1998.

SO ORDERED.

SIGNED this the 2nd day of July, 1998

S/Jeff Kaplan
JEFF KAPLAN, UNITED STATES
MAGISTRATE JUDGE IN THE UNITED
STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARYN M. VOSKUIL	§	**NO. 3:96-cv-0683-D**
Plaintiff,	§	
	§	
	§	
VS.	§	
	§	
ENVIRONMENTAL	§	
HEALTH CENTER	§	
- DALLAS and RICK	§	
SELLERS	§	
individually and as	§	
a servant of Environ-	§	
mental Health Center	§	**Dallas, Texas**
of Dallas,	§	**June 25, 1998**
Defendants.	§	

HEARING ON MOTIONS
BEFORE HON. JEFF KAPLAN
U.S. MAGISTRATE

APPEARANCE:

For Plaintiff:
MS. NADINE KING-MAYS
Attorney at Law
824 North Marsalis Avenue
Suite B
Dallas, Texas 75203

For Defendant:
MR. STEPHEN A. COKE
Wesner, Coke & Clymer
Three Lincoln Center, Ste. 1280
5430 L.B.J. Freeway
Dallas, Texas 75240

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

"minute recess and then I'm going to come back and try and put this issue to rest and dictate findings.

(Short Recess)

THE COURT: The case has been remanded to the United States Magistrate Judge for further consideration of defendant's motion to compel filed on December 2, 1996, and plaintiff's motion for protective order filed on December 17, 1996. The Magistrate Judge previously ordered plaintiff to produce all of her medical records that contain any references to mental illness or psychological disorders. The District Judge determined that this order was facially over broad "because it assumes that all medical records and related documents are discoverable pursuant to the sword-shield doctrine." The motions were remanded with instructions to conduct an in camera inspection "in which the Magistrate Judge evaluates the Rule 26(a)(1) discovery standard, the sword-shield doctrine, and Voskuil's damages claim in the context of the records and related documents themselves." Plaintiff was ordered to provide a privilege log and tender these documents to the Court for an in camera inspection. The District Judge in his remand order then given the opportunity to brief the issues raised the parties. The Court has reviewed the documents, read the briefs, and heard the argument of counsel. For the reasons stated herein, defendant's motion is granted and plaintiff's motion is denied.

Under Rule 26(b)(1), parties may obtain discovery regarding "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Relevancy under Rule 26 is to be broadly construed. Documents or other information are relevant if it bears on, or reasonably could bear on, an issue that is or may be involved in the litigation. In some circumstances, however, Rule 26(c) permits a court to restrict discovery of relevant material to protect a party from annoyance, embarrassment, oppression or undue burden or expense. The party seeking relief must show good cause for a protective order.

Plaintiff argues that her psychiatric and psychological records are privileged. Indeed, the Supreme Court has held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 502 of the Federal Rules of Evidence." *Jaffee v. Redmond, 116 S.Ct. 1923 at 1931, a 1996* case. The Court rejected a test that balances the need for this information against the privacy interests of the witness. However, the Court specifically noted that "like other testimonial privileges, the patient may, of course, waive the protection." *Jaffee, 116 S.Ct. at 1931 n. 14*

The issue before the Court is not whether Plaintiff's medical records are privileges. Both parties concede that they are. Rather, the question in this case boils down to whether plaintiff has waived the privilege. The Supreme Court did not address waiver in *Jaffee*, explicitly leaving the contours of this new

privilege to be fleshed out over time on a case-by-case basis. However, other courts confronted with this issue have turned to Supreme Court standard 504 for guidance. This standard provides, in pertinent part, that "there is no privilege under this rule as to communications relevant to an issue of mental or emotional condition of a patient in any proceeding in which he relies upon the condition as an element of his claim or defense." See also 3 Weinstein & Berger, Weinstein's Federal Evidence, Section 504.1, and 8 Wright 7 Miller, Federal Practice and Procedure, Section 2016.2. Stated differently, plaintiff cannot use her mental condition as both a sword and a shield. The Court must therefore determine whether plaintiff has placed her mental condition at issue in this litigation.

The Court notes at the outset that the legal standard governing whether a party places her mental condition "at issue" under Rule 26 is not necessarily the same as whether she has placed her mental condition "in controversy" under Rule 35. At least one court has recognized that the standard under Rule 35 is more restrictive. *Lanning v. Southeastern Pennsylvania Transportation Authority, 1997 Westlaw, 595905, Eastern District of Pennsylvania, September 17, 1997.* Indeed. a physical or mental examination under Rule 35 is far more intrusive than the production of documents, particularly where the production, as here, is subject to a protective order. It only makes sense that the burden on a party seeking a Rule 35 examination be more exacting.

Nevertheless, the Magistrate Judge previously found that plaintiff has placed her mental condition in

controversy. See Order, October 3, 1997. This finding was not addressed by the District Judge prior or remand. The Magistrate Judge now determined that even if plaintiff's mental condition is not "in controversy," it is certainly "at issue." Plaintiff alleges in Paragraph 31 of her first amended complaint that "as a result of the hostile work environment, she suffered an extreme episode of depression and was at the point of committing suicide." The complaint goes on to state that plaintiff was required to receive counseling from a therapist and took a medical leave of absence because of the intensity of her depression. These allegations are more fully developed in plaintiff's interrogatory answers. In response to interrogatory No. 21, plaintiff states that as a result of the harassment and hostility she suffered on the job, she "had become severely depressed and was having suicidal thoughts and had decided that my life was not worth living if I had to face that type of abuse each day."

It is clear that plaintiff's claims involve emotional and psychological damages resulting from the alleged hostile work environment created by defendant. Plaintiff maintains that she is not claiming severe emotional distress, will not present expert testimony on the issue, and is only seeking statutory damages under 42 U.S.C. Section 1981a. A similar argument was rejected in *Lanning*. There plaintiff argued that her psychiatric and psychological records were not discoverable because: (1) she was not seeking damages for psychiatric or psychological injury; (2), she was not going to have expert testimony on this issue; and (3), she did not have an independent tort claim for severe emotional distress.

The district court held that despite plaintiff's attempts to limit damages regarding her emotional distress, that claim remained part of her case. Quoting from another district court opinion, the Judge wrote:

"We are not persuaded , however, that waive of the privilege should be made to turn on the nature of the plaintiff's evidence rather than on the nature of her claim. Implied waivers of privilege are justified by the interests of the state in seeing that the truth is ascertained in legal proceedings and fairness to the adversary. If a plaintiff seeks damages for alleged emotional or psychological injuries, the defendant's case ought not to be limited by plaintiff's decision not to introduce available medical or psychological testimony that bears directly on the truth of the claim."

Lanning. 1997 Westlaw 597905 at 2, quoting Thorne v. Universal Properties, Inc., 1997 Westlaw 7683 at 2, Eastern District of Pennsylvania.

Although plaintiff does not intend to introduce expert testimony on this subject, she fully intends to seek compensatory damages under Title VII. An element of those damages is emotional distress. This is evident by plaintiff's complaint and interrogatory answers. The type of emotional distress allegedly suffered by plaintiff was quite severe. She states that she had suicidal thoughts, required counseling, and took a medical leave because of the intensity of her depression. These types of allegations are sufficient to put plaintiff's mental condition "at issue." See also *Lahr v. Fulbright & Jaworski, 164 F.R.D. 205 at 209, Northern District of Texas, 1996.* At minimum, defense counsel has the right to inquire into plaintiff's past

and obtain her medical records for the purpose of showing that her emotional distress was caused, at least in part, by events and circumstances that were not job related. Allowing plaintiff to hide behind the privilege "would simply be contrary to the most basic sense of fairness and justice." *Sarko v. Penn-Del Directory Company, 170 F.R.D. 127 at 130, Eastern District of Pennsylvania, 1997; see also Kerman v. City of New York, October 24, 1997; Doolittle v. Ruffo, 1997 Westlaw 151799, Northern District of New York, March 31, 1997; Vann v, Lone Star Steakhouse and Saloon of Springfield, Inc., 967 F. Supp. 346, Central District of Illinois, 1997.*

For these reasons, the Magistrate Judge finds that plaintiff has placed her mental condition at issue, thereby waiving the psychotherapist-patient privilege.

The Court must now evaluate plaintiff's damage claim in the context of the records themselves. Plaintiff has tendered medical records pertaining to her mental condition from two different providers. The first set of records is from Dr. Margie McKeon, a psychologist. These records consist of two intake forms completed by plaintiff and her mother, and 38 pages of notes. The notes were made during therapy sessions from November 11, 1992 through January 4, 1994 and consist of, (1) background information provided by plaintiff; (2), goals as outlined by the therapist; (3) treatment plans; and (4), provisional diagnoses. The Court has carefully reviewed the records and find that all of the notes are relevant to plaintiff's damages claim. These records show , and plaintiff concedes , that she suffered from a major depressive disorder. Many of the entries refer to events that occurred when plaintiff was employed by

defendant, but other entries tend to show that this depression was caused or exacerbated by other events in her life. Defendant has a right to review these records and share them with its expert for the purpose of trying to show that plaintiff's emotional distress was not job related. Defendant is not entitled to the intake forms completed by plaintiff and her mother, which contain no such relevant information.

The second set of records are from Dr. Jerome Statman, a psychiatrist. Plaintiff saw Dr. Statman from September 27, 1993 through May 4, 1996. These records consist of (1), notes made by the doctor each time he saw plaintiff; (2), various psychological assessments and questionnaires; (3), prescription records; (4), laboratory test results; (5), documents pertaining to a disability claim filed by plaintiff; (6), phone messages from plaintiff; and (7), miscellaneous correspondence. The Court notes at the outset that plaintiff has selectively produced some of these records to defendant during discovery. Specifically, page numbers 70, 73, 74, 75, 79, and 86 are attached to the Second Affidavit of Stephen Coke in support of defendant's response. The Court finds that this, in and of itself constitutes a waiver of privilege in connection with all related entries contained in the records. Moreover, the notes made by Dr. Statman, as well as the psychological assessments, prescription records, and test results all contain information relevant to plaintiff's damage claim. Like Dr. McKeon's records, these documents show that plaintiff suffered from a major depressive disorder prior to the events made the basis of this suit. They also contain references to psychological problems experienced by plaintiff while she was employed by defendant. Since

plaintiff seeks damages for emotional distress allegedly caused by her sexual harassment and constructive discharge, defendant is entitled to review these records in order to prepare its defense. Finally, some of the documents tendered by plaintiff simply are not privileged. Information provided to the Department of Labor, page 69, plaintiff's disability insurance company, pages 71-72 and 82-86, and other third parties, pages 76. 78 and 79, fall outside the scope of the psychotherapist-patient privilege recognized in *Jaffee.*

Defendant also suggests that plaintiff has not submitted all records pertaining to her mental condition for the past ten years. Defendant points to plaintiff's deposition testimony where she identifies at least four other health career providers from whom she received treatment. Two of these providers are unnamed physicians who allegedly treated plaintiff back in the early 1980's. This is outside the scope of the ten year period specified in defendant's discovery requests. Consequently, plaintiff was under no obligation to tender these documents to the Court. The other two physicians, Drs. Katami and Roatan, treated plaintiff within the past ten years. However, counsel for plaintiff has represented that Dr. Katami's records are included in Dr. Statman's records. Indeed, the documents submitted to the Court contain a medical authorization to enable Dr. Statman to obtain Dr. Katami's records. As for Dr. Roatan, plaintiff explains that he did not treat her for any medical condition per se. The Court accepts these representations and will not require plaintiff to submit these records for an in camera inspection, nor will they be produced to defendant.

Accordingly, the Magistrate Judge finds that the records of Dr. Maggie McKeon and Dr. Jerome

Statman shall be produced to the defendant in their entirety, save the intake forms completed by plaintiff and her mother, Pages 1-4. Plaintiff shall also answer Interrogatory No. 14 as previously directed by the Court. These documents and interrogatory answers shall be served on counsel for defendant by July 6, 1998 unless plaintiff appeals this order to the District Judge. The production of these documents and interrogatory answers shall be subject to the protective order previously entered by this Court.

Mr. Coke, I want you to prepare an order for my signature, specifically incorporating by reference the oral findings dictated into the record, have it approved as to form by Ms. King-Mays, and have that order, signed by both counsel, hand delivered to my chambers by noon on Thursday.

MR. COKE: May I ask one issue just for clarification? The July 6th date, I heard you say that you wanted the answer to the interrogatory then. Is it the Court's intention that production will be delivered at the same time?

THE COURT: I believe I ordered that the documents be produced in the interrogatory answer, but if I didn't say that, that's what I meant.

Mr. COKE: Thank you.

THE COURT: Anything else? Okay, ya'll are excused.

(Hearing Concluded)

I, Betty S. Tate, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

June 29, 1998 S/Betty S Tate

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARYN M. VOSKUIL	§	
Plaintiff,	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	
	§	**3:96-CV-0683-L**
ENVIRONMENTAL	§	
HEALTH CENTER	§	**[U.S. DISTRICT COURT]**
- DALLAS and RICK	§	**NORTHERN DISTRICT OF TEXAS**
SELLERS	§	**[FILED]**
individually and as	§	**[FEB 24 1999]**
a servant of Environ-	§	**NANCY DOHERTY, CLERK**
mental Health Center	§	**[By, s/_____, deputy]**
of Dallas,	§	
Defendants.	§	

ORDER

Before the Court are Plaintiff's Substantive Objections to Magistrate's Ruling Regarding Defendant's Motion to Compel, filed July 20, 1998. A Court may modify or set aside a magistrate judge's ruling on a nondispositive pretrial matter only when the ruling is shown to be "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a); and *Castillo v. Frank*, 70 F.3d 382, 85 (5th Cir. 1995) Upon consideration of Plaintiff's objections, Defendant's response and Plaintiff's reply, the Magistrate' Judge's order, and the applicable law, the court has determined that the Magistrate Judge's order is neither clearly erroneous nor contrary to law. Therefore Plaintiff's objections are OVERRULED, and

the Magistrate Judge's order is AFFIRMED in all respects. Plaintiff shall produce her mental health records and otherwise respond to discovery as ordered by United States Magistrate Judge Jeff Kaplan by March 5, 1999.

SO ORDERED.

SIGNED this the 24th day of February, 1999.

S/Sam A. Lindsay
Sam A. Lindsay
United States District Judge

[ENTERED ON DOCKET]
[FEB 25 1999]
[U.S. DISTRICT CLERK'S OFFICE]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARYN M. VOSKUIL	§	
Plaintiff,	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	
	§	**3:96-CV-0683-L**
ENVIRONMENTAL	§	
HEALTH CENTER	§	[U.S. DISTRICT COURT]
- DALLAS and RICK	§	NORTHERN DISTRICT OF TEXAS
SELLERS	§	[FILED]
individually and as	§	[MAR 11 1999]
a servant of Environ-	§	[NANCY DOHERTY, CLERK]
mental Health Center	§	[By s/_____, deputy]
of Dallas,	§	
Defendants.	§	

ORDER

Before the Court are Plaintiff's Motion to Reconsider and Set Aside District Court Judge's Order of February 24, 1999 Affirming Magistrate's Order, filed March 9, 1999, and Plaintiff's Motion for Stay of Ruling on Defendant's Motion to Compel Pending District Judge's Determination on Plaintiff's Motion to Reconsider and Set Aside Order of February 24, 1999 Affirming Magistrate's Order, filed March 5, 1999. Both are hereby DENIED.

[ENTERED ON DOCKET]
[MAR 11 1999]
[U.S. DISTRICT CLERK'S OFFICE]

SO ORDERED.

Signed this 11th day of March, 1999.

S/Sam A. Lindsay
Sam A. Lindsay
United States District Judge

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[ENTERED ON DOCKET]
[JUN 14 1999]

CARYN M. VOSKUIL	§	[U.S. DISTRICT CLERK'S OFFICE]
Plaintiff,	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	
	§	**3:96-CV-0683-L**
ENVIRONMENTAL	§	
HEALTH CENTER	§	[U.S. DISTRICT COURT]
- DALLAS and RICK	§	NORTHERN DISTRICT OF TEXAS
SELLERS	§	[FILED]
individually and as	§	[JUN 11 1999]
a servant of Environ-	§	[NANCY DOHERTY, CLERK]
mental Health Center	§	[By, s/_____, deputy]
of Dallas,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the court are Defendant's Motion for Contempt and Sanctions and Motion for Continuance, filed April 12, 1999, Plaintiff's Motion for Protective Order, filed April 22, 1999, and Plaintiff's Objections to Imposition of Monetary Sanctions, filed April 27, 1999. Upon consideration of the motions, responses, replies, oral argument of counsel, comments of Plaintiff, and the applicable law, Defendant's Motion for Contempt and Sanctions and for Continuance is **granted**, and Plaintiff's Objections to Imposition of Monetary Sanctions are **overruled**. Plaintiff's Motion for Protective Order is granted in part, and denied in part, and Defendant's Motion for Continuance is **granted**.

I. Factual and Procedural Background

The parties and the court are well-acquainted with the history of the controversy. While it is not necessary to repeat every factual detail related to the instant motions, the court will briefly outline some of the relevant facts. After a discovery dispute arose regarding Defendant Environmental Health Center-Dallas' ("Defendant") request for Plaintiff's medical records, including her mental health records, United States Magistrate Judge Jeff Kaplan entered an order on July 2, 1998 granting Defendant's motion to compel and requiring Plaintiff to produce all of her medical records including her mental health records, and to answer one of Defendant's interrogatories. Plaintiff filed objections to the United States Magistrate Judge's ruling, and the objections were overruled by this court on February 24, 1999. Plaintiff was ordered to produce her medical records and otherwise comply with the order by March 5, 1999. On March 9, 1999; Plaintiff filed her Motion for Reconsideration of the court's February 24th order. This motion was denied on March 11, 1999.

II. Defendant's Motion for contempt and Sanctions

Plaintiff and her counsel failed and refused to comply with the court's orders of February 24, and March 11orders, prompting Defendant to file its Motion for Contempt and Sanctions, and Motion for Continuance. In her response to Defendant's motion, Plaintiff cross-moved for a protective order, seeking a ruling from the court to reverse its previous decisions and the previous decision of the United States

Magistrate Judge requiring her to produce the discovery sought.

A hearing was held on Defendant's motion on April 23, 1999. At the hearing, Plaintiff's counsel stated on the record that she did not plan to comply with the court's orders requiring production. Plaintiff further expressed her fear that Defendant would misuse her medical records by publicly disclosing them or using them for purposes other than defending itself in this litigation. **After the court raised the issue**, Plaintiff and her counsel agreed to turn over the documents if limitations were placed on disclosure of the documents and information produced. While Plaintiff and her counsel argued at the hearing that they had requested this type of protection from the United States Magistrate Judge, and that he had refused such request, the issue was never raised in Plaintiff's objections to the United States Magistrate Judge's order, or raised in the Motion for Protective Order Plaintiff filed on April 22, 1999, the day before the hearing. Also in the cross-motion for protective order filed on April 22, Plaintiff's psychiatrist has attempted to prevent production of the records by raising the psychotherapist-patient privilege for the first time. While the court questions whether the psychotherapist holds a privilege that would protect these records from production, it need not consider the merits of this objection because the objection has come far too late and is therefore waived.

To establish civil contempt, the party seeking an order of contempt need only establish that (1) a court order was in effect; (2) the order required certain conduct by the respondent; and (3) that the

respondent failed to comply with the court's order. FDIC v. LeGrand, 43 F.3d 163, 170 (5th Cir. (1995); Martin v. Trinity Industries, Inc., 959 F2d 45, 47 (5th Cir. 1992). Defendant has carried this burden, and at the hearing the court confirmed that the order had not been complied with by asking Plaintiff's counsel if she had complied with the order. She responded that she had not, did not adequately justify her failure to do so, and presented no other relevant defense for her failure to comply. Plaintiff confirmed that she agreed with and approved of her attorney's conduct. See Id. The actions of Plaintiff and her counsel have been willful and without justification. As such their actions unnecessarily delayed the disposition of this case and unnecessarily caused the court to expend time on a matter that could have been directed toward other pressing matters on its docket. Therefore, the court holds both Plaintiff Caryn Voskuil and her counsel, Nadine King-Mays in contempt for willfully refusing to comply with valid court orders pursuant to Fed.R.Civ.P. 37(b).

Such refusal constitutes contumacious conduct that requires appropriate sanctions. Although there is a clear record of contumacious conduct on the part of Plaintiff and her counsel, and dismissal of this action with prejudice is justified, the court will not impose such a draconian remedy. If a lesser sanction will obtain compliance, that sanction should be imposed. Bann v. Ingram Micro. Inc., 108 F3d 625, 627 (5th Cir. 1997); Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1032 (5th Cir. 1990).

Plaintiff has field objection to the imposition of sanctions. The vast majority of Plaintiff's objections

relate to underlying issues and previous court orders related to the production of her medical records. The court has previously overruled these objections in its *February 24th and March 11th orders. Plaintiff's* other objection is that portions of the billing statements submitted by Defendant are redacted, and that she requests that Defendant be required to provide unredacted copies of the statements. In response to its May 5, 1999 order, the court has received and reviewed unredacted copies of the billing statements, and it has concluded that the previously redacted portions of the statements are immaterial to its ruling regarding attorney fees. Plaintiff's objections are hereby **overruled.**

Plaintiff and her counsel have agreed to produce the documents as long as disclosure of the documents is reasonably limited. Plaintiff and her counsel will be required to reimburse Defendant for attorneys fees and costs in the amount determined by the court. The court therefore orders that the following restrictions are placed on the use of Plaintiff's medical records once they are produced to Defendant:

(a) Disclosure and use of Plaintiff's medical records shall be limited to employees of Defendant who are involved as witnesses in or are otherwise working on the defense of this case, Defendant's attorneys (including support staff), and any expert witnesses who are retained by Defendant to offer opinions regarding Plaintiff's physical or mental health (including their support staff);

(b) any person permitted access to Plaintiff's medical records under paragraph(a) shall not reveal them publicly or otherwise use them for purposes not related to the prosecution or defense of the lawsuit;

(c) any person permitted access to Plaintiff's medical records under paragraph (a) shall read this protective order and agree to abide by its terms prior to receiving access to the documents;

(d) Defendant shall make only those copies necessary for the purpose stated herein; and

(e) upon conclusion of this lawsuit, Plaintiff's medical records (and all copies made thereof) shall be returned to Plaintiff's counsel within ten (10) days after disposition of the case by the court.

With regard to Defendant's request for attorney's fees and costs, the court has reviewed the affidavit and billing records submitted by Defendant's counsel and it familiar with the typical hourly rates for attorneys and the level of experience of Messrs. Coke and Winn. The court finds that the hourly rates requested by Messrs. Coke and Winn are reasonable, customary, and within the usual range for attorneys with their respective levels of experience and skill for the types of matters similar to this suit. The court also finds that the services rendered, except for the 4 hours claimed by Mr. Winn to attend the hearing on April 23, 1999, were reasonable and necessary regarding Defendant's Motion for Contempt and Sanctions and Motion for Continuance. The court will therefore reduce the fee request by $580.00 ($145.00 per hour x 4 hours).

The court has reviewed the redacted portions of Defendant's counsel's billing records. The redacted portion will not affect the award of attorneys fees, as the court finds that the amount of time expended for the description of the work was reasonable and necessary. Any objections made by Plaintiff that she

was unable to review the redacted language are without merit and are **overruled.** The court, however, does not believe that the redacted portions are privileged. No privilege would be waived by disclosure of the redacted portions of the billing records. Accordingly, the court directs Defendant's counsel to file an unredacted copy of its billing record by June 18, 1999.

As was stated by the court at the hearing, the award of attorney's fees to Defendant is an appropriate sanction for the contempt of Plaintiff and her counsel. The court has determined that $7,589.00 is a reasonable amount of attorney's fees for the work necessarily done by Defendant's counsel in bringing the Motion for Contempt, for Sanctions, and Motion for Continuance. At the hearing that Plaintiff and her counsel presented a united front and stated that they both refused to comply with the court's earlier orders; therefore , the court concludes that both Plaintiff and her counsel are equally culpable, and the imposition of sanctions on them both is appropriate. Plaintiff Caryn Voskuil shall reimburse Defendant for attorney's fees in the amount of $3,794.50, and Nadine King-Mays shall reimburse Defendant for $3,794.50. Plaintiff and Ms. King-Mays shall remit these sanctions to Defendant's counsel no later than July 11, 1999. Failure to pay the sanctions imposed within the time set out in this order will result in dismissal of Plaintiff's claims with prejudice.

III. Defendant's Motion for Continuance

Defendant has moved to continue the current May 1999 trial setting in this matter. This motion is

granted. The court will issue a separate order setting out the new trial date and pretrial filing deadlines.

IV. Conclusion

For the reasons set forth above, Defendant's Motion for Contempt, for Sanctions, and Motion for Continuance are **granted.** Plaintiff's Objections to Imposition of Monetary Sanctions are **overruled**, and Plaintiff's Motion for Protective Order is **denied in part,** to the extent that it seeks an order precluding discovery of her medical records by Defendant. Plaintiff's Motion for Protective Order is **granted in part**, in that such documents will be produced by Plaintiff subject to the restrictions outlined herein. Plaintiff and her counsel shall produce the documents in question and otherwise comply with the orders previously entered by the United States Magistrate Judge and this court by June 22, 1999, and Plaintiff and her counsel shall pay the monetary sanction to Defendant by July 11, 1999. If Plaintiff fails to comply with the court's order regarding either of those dates, Plaintiff's claims **will be dismissed with prejudice.**

SO ORDERED.

Signed this 11th day of June, 1999.

S/Sam A. Lindsay
Sam A. Lindsay
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARYN M. VOSKUIL	§	
Plaintiff,	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	
	§	**3:96-CV-0683-L**
ENVIRONMENTAL	§	
HEALTH CENTER	§	[U.S. DISTRICT COURT]
- DALLAS and RICK	§	NORTHERN DISTRICT OF TEXAS
SELLERS	§	[FILED]
individually and as	§	[JUN 22 1999]
a servant of Environ-	§	[NANCY DOHERTY, CLERK]
mental Health Center	§	[By s/_____,deputy]
of Dallas,	§	
Defendants.	§	

ORDER

Before the Court is Plaintiff's Motion for Stay of Court's Order of June 11, 1999 pending consideration of Plaintiff's Application for Writ of Mandamus, filed June 21, 1999. Plaintiff's motion is **denied**.

SO ORDERED.

[ENTERED ON DOCKET]
[JUN 23 1999]
[U.S. DISTRICT CLERK'S OFFICE]

Signed this 22nd day of June, 1999.

S/Sam A. Lindsay
Sam A. Lindsay
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARYN M. VOSKUIL	§	
Plaintiff,	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	
	§	**3:96-CV-0683-L**
ENVIRONMENTAL	§	
HEALTH CENTER	§	[U.S. DISTRICT COURT]
- DALLAS and RICK	§	NORTHERN DISTRICT OF TEXAS
SELLERS	§	[FILED]
individually and as	§	[JUN 30 1999]
a servant of Environ-	§	[NANCY DOHERTY, CLERK]
mental Health Center	§	[By s/_____,deputy]
of Dallas,	§	
Defendants.	§	

ORDER

Before the Court is Defendant's Motion to Enforce Contempt Sanction of Dismissal with Prejudice, filed June 28, 1999. The motion states that Plaintiff has failed to comply with the court's June 11, 1999 order requiring her to produce her medical records, including her mental health care records, and answer one of Defendant's interrogatories by June 22, 1999. The sole issue raised by Defendant's motion is whether Plaintiff complied with the court's order by June 22, 1999. Plaintiff has either complied by that date or not complied, and that is all the court wants to know. The court does not want a lengthy response.

Accordingly, Plaintiff is ordered to file a short written response to the court stating whether or not she complied with the court's order requiring her to produce her medical records, including her mental health records, and answered the interrogatory in question by June 22, 1999. Plaintiff's response to this order shall be filed in the court's chambers by **3:00 p.m. today.**

SO ORDERED.

Signed this 30th day of June, 1999.

S/Sam A. Lindsay
Sam A. Lindsay
United States District Judge

[ENTERED ON DOCKET]
[JUN 30 1999]
[U.S. DISTRICT CLERK'S OFFICE]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARYN M. VOSKUIL	§	
Plaintiff,	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	
	§	**3:96-CV-0683-L**
ENVIRONMENTAL	§	
HEALTH CENTER	§	[U.S. DISTRICT COURT]
- DALLAS and RICK	§	NORTHERN DISTRICT OF TEXAS
SELLERS	§	[FILED]
individually and as	§	[JUN 30 1999]
a servant of Environ-	§	[NANCY DOHERTY, CLERK]
mental Health Center	§	[By s/_____,deputy]
of Dallas,	§	
Defendants.	§	

ORDER OF DISMISSAL

Before the Court is Defendant's Motion to Enforce Contempt Sanction of Dismissal with Prejudice, filed June 28, 1999. Plaintiff and her counsel have failed to comply with the orders of February 24, March 11, and June 11, 1999, wherein Plaintiff was ordered to produce her medical records and respond to interrogatory No. 14 by June 22, 1999.

Defendant states in its motion that Plaintiff failed to produce the relevant documents or to answer the interrogatory in question by June 22, 1999, the deadline set out by the court. In her Response to Court's Order of June 30, 1999, Plaintiff confirmed

her failure to comply with the order by stating that "Plaintiff cannot deliver the privileged documents to Defendant as ordered by this court without mooting its claim for Mandamus relief or mooting the issue for Appeal."

To establish civil contempt it must be shown that (1) a court order was in effect; (2) the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order. F.D.I.C. v. LeGrand, 43 F.3d 163, 170 (5th Cir. 1995); Martin v. Trinity Industries, Inc., 959 F.2d 45, 47 (5th Cir. 1992). All of these factors are present here. Plaintiff's repeated failure to comply with the court's orders establishes that Plaintiff and her counsel are again in contempt of court, thus warranting sanctions for their conduct.

Plaintiff further states that the court failed to review Plaintiff's Objections to the Magistrate's Order and other pleading s which were filed in the course of the instant dispute. This allegation is simply untrue. Plaintiff also argues that "the District Judge during the April 23, 1999 hearing demonstrated that the was unaware that the Magistrate Judge's Order did not place limitations on the disclosure." This statement is also incorrect. The court was aware that the Magistrate Judge's order did not include limitations on disclosure of the information to be produced; however, at the April 23, 1999 hearing the court asked Plaintiff whether she had ever requested such limitations from the Magistrate Judge, because the court had reviewed the record prior to the hearing and

determined that it did not contain this type of request. Rather, Plaintiff had consistently argued that she should not be required to produce the documents at all.

The court has attempted to correct Plaintiff's prior conduct by imposing lesser sanctions; however, it has been unsuccessful in obtaining Plaintiff's compliance despite the imposition of those sanctions. See Bann v. Ingram Micro, Inc., 108 F.3d 625, 627 (5th Cir. 1997)(dismissal is an inappropriate sanction when lesser sanction will obtain party's compliance.); Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1032 (5th Cir. 1990)(same). Despite the court's orders and monetary sanctions imposed, and despite her agreement at the hearing held before the court on April 23, 1999 to produce her medical records subject to protective restrictions, Plaintiff and her counsel continue their refusal to comply with the court's orders, thus displaying a clear record of contumacious conduct requiring appropriate sanctions. This pattern of conduct demonstrates their disrespect for the court and the court cannot permit it to continue.

No sanction short of dismissal of Plaintiff's claim with prejudice will be effective in this instance. The court's June 11, 1999 order stated that if Plaintiff failed to comply with the deadlines set out therein, her claims would be dismissed with prejudice. Knowing that dismissal would be the inevitable consequence, Plaintiff has failed to comply with the court's June 11, 1999 order, therefore, Defendant's motion is **granted,**

and Plaintiff's claims are hereby **dismissed with prejudice.**

SO ORDERED.

Signed this 30th day of June, 1999.

S/Sam A. Lindsay
Sam A. Lindsay
United States District Judge

[ENTERED ON DOCKET]
[JUL 1 1999]
[U.S. DISTRICT CLERK'S OFFICE]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARYN M. VOSKUIL	§	
Plaintiff,	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	
	§	**3:96-CV-0683-L**
ENVIRONMENTAL	§	
HEALTH CENTER	§	[U.S. DISTRICT COURT]
- DALLAS and RICK	§	NORTHERN DISTRICT OF TEXAS
SELLERS	§	[FILED]
individually and as	§	[JUN 30 1999]
a servant of Environ-	§	[NANCY DOHERTY, CLERK]
mental Health Center	§	[By, s/_____, deputy]
of Dallas,	§	
Defendants.	§	

JUDGMENT

This Judgment is entered pursuant to the court's order of dismissal of June 30, 1999. It is therefore ORDERED, ADJUDGED, and DECREED THAT Plaintiff take nothing by her suit against Defendant, that this action is hereby dismissed with prejudice, and that all costs are taxed against Plaintiff.

SO ORDERED.
Signed this 30th day of June, 1999.

S/Sam A. Lindsay
Sam A. Lindsay
United States District Judge

[ENTERED ON DOCKET]
[JUL 1 1999]
[U.S. DISTRICT CLERK'S OFFICE]

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[ENTERED ON DOCKET]
[JUL 19 1999]

CARYN M. VOSKUIL	§	[U.S. DISTRICT CLERK'S OFFICE]
Plaintiff,	§	
	§	
	§	**CIVIL ACTION NO.**
VS.	§	
	§	**3:96-CV-0683-L**
ENVIRONMENTAL	§	
HEALTH CENTER	§	[U.S. DISTRICT COURT]
- DALLAS and RICK	§	NORTHERN DISTRICT OF TEXAS
SELLERS	§	[FILED]
individually and as	§	[JUL 19 1999]
a servant of Environ-	§	[NANCY DOHERTY, CLERK]
mental Health Center	§	[By, s/_____, deputy]
of Dallas,	§	
Defendants.	§	

ORDER

Before the court is Plaintiff's Motion for Additional Findings of Fact, filed July 15, 1999.

Plaintiff's motion is hereby denied.

SO ORDERED.

Signed this 19th day of July, 1999.

S/Sam A. Lindsay
Sam A. Lindsay
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUN 19 2000
CHARLES R. FULBRUGE, III
CLERK

No. 99-10886

CARYN M. VOSKUIL
Plaintiff-Appellant

v.

ENVIRONMENTAL HEALTH CENTER-DALLAS, INC.,
Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas
3:96-CV-683-L

Before JONES and BENEVIDES, Circuit Judges, and Walter*, District Judge.

PER CURIAM:**

Appellant Caryn M. Voskuil ("Voskuil") appeal the dismissal with prejudice of her Title VII sexual harassment suit. The dispute which culminated in the dismissal arose when appellee Environmental Health Center-Dallas ("EHC-D") requested-and

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* District Judge of the Western District of Louisiana, sitting by designation.

** Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5

Voskuil refused to produce-the records of Voskuil's treatment for depression with Dr. Margie McKeon, a psychologist, and Dr. Jerome Statman, a psychiatrist. Both parties agreed that the records were privileged material, but the EHC-D maintained that Voskuil had waived the privilege based on her request for damages for emotional distress and injury that extended to suicidal, thoughts and believing that life was not worth living. On July 2, 1998, the magistrate judge agreed with EHC-D and ordered Voskuil to produce the documents. The district court judge overruled Voskuil's objections to the magistrate judge's ruling and subsequently denied motion for reconsideration.

After Voskuil refused to comply with the magistrate judge's order, the district court judge held a contempt hearing on April 23, 1999. At the hearing, Voskuil's counsel conceded that she had flouted the court's order; Voskuil indicated that she endorsed her counsel's conduct. Upon questioning, however, Voskuil agreed that she would produce the medical records if their disclosure was reasonably limited.

In its June 11, 1999 ruling on the contempt motion, the district court imposed monetary sanctions and ordered Voskuil to produce the medical records. However, the district court also established certain limitations on who could obtain access to the records and for what purposes the records could be used. Finally, the district court warned that if Voskuil neglected to comply with its mandate, it would dismiss her case with prejudice.

On June 30, 1999, after Voskuil once again failed to produce the documents by the court-imposed deadline, the district court dismissed Voskuil's case with prejudice after finding that such action was the only effective sanction under the circumstances.

We hold that the district court did not abuse its discretion in doing so. Though Voskuil now argues that the magistrate judge allowed no limitations on the disclosure of this sensitive material, the record reveals that Voskuil never requested any such reasonable limitations on the disclosure of the records before the magistrate judge. The issue of reasonable limitations did arise at the contempt hearing when the district court suggested it. Having agreed to release the medical records with the protection of the limitations set forth in the district court's June 11, 1999 order, and having been warned that continued failure to produce the records would lead to a dismissal with prejudice, Voskuil cannot now complain that the sanction was an abuse of discretion. She twice intentionally disregarded the court's orders, misrepresented her future course of conduct to the district court, failed to pay the monetary sanctions that were a lesser punishment for her contempt, and knew the consequences of her actions would be the demise of her suit. In this context, we cannot say that the district court abused its discretion in dismissing the case with prejudice.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUN 24 2000
CHARLES R. FULBRUGE, III
CLERK

No. 99-10886

CARYN M. VOSKUIL
Plaintiff-Appellant

v.

ENVIRONMENTAL HEALTH CENTER-DALLAS, INC.,
Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before JONES and BENEVIDES, Circuit Judges, and Walter*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:

s/_____
United States Circuit

* District Judge of the Western District of Louisiana, sitting by designation.

REHG-2

Title 28 Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Title 42 Sec. 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by

section 706(g) of the Civil Rights Act of 1964, from the respondent.

(b) Compensatory and punitive damages

(1) Determination of punitive damages. A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages
Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)).

(3) Limitations
The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Title 42 Sec. 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Federal Rules of Civil Procedure

Rule 26; (b) Discovery Scope and Limits.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is

subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...

Rule 37. Failure to Make or Cooperate in Discovery; Sanctions

Motion for Order Compelling Disclosure or Discovery.

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court.

An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a) , any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31 , or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a) , or a party fails to answer an interrogatory submitted under Rule 33 , or if a party, in response to a request for inspection submitted under Rule 34 , fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(1) Evasive or Incomplete Disclosure, Answer, or Response.

For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was

filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(D) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35 , or if a party fails to obey an order entered under Rule 26(f) , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows

that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the sanctions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36 , and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant

to Rule 36(a) , or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33 , after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34 , after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c) .

Rule 72. Magistrate Judges; Pretrial Orders

(a) Nondispositive Matters.

A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Federal Rules of Evidence
Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts

of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Supreme Court Standard § 504(d)3 (in relevant part):

There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense.

Supreme Court, U.S.
FILED
JAN 26 2001
OFFICE OF THE CLERK

No. 00-1044

IN THE

Supreme Court of the United States

CARYN VOSKUIL,

Petitioner,

v.

ENVIRONMENTAL HEALTH CENTER - DALLAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Environmental Health Center-Dallas, Inc. ("EHC") has no parent corporation and no publicly held company owns ten percent (10%) or more of the stock of EHC.

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STATEMENT OF THE CASE

The facts necessary to address the arguments set forth in the Petition for writ of certiorari filed by Petitioner Caryn Voskuil ("Voskuil") are adequately presented in the District Court and Fifth Circuit opinions which are incorporated herein by reference. *See Petition*, App. 17-24, 28-30, 34-36. However, the Statement of the Case presented by Voskuil is rife with misleading, inaccurate and erroneous assertions of fact and requires correction in the following two specific areas. First, Voskuil is not merely asserting a "garden-variety" claim of discrimination as discussed in Section A below. Second, this is not a case in which Voskuil in good faith simply stood in contempt in order to preserve her psychotherapist privilege as discussed in Section B below.

A. Voskuil Is Not Asserting Merely A "Garden Variety" Claim of Discrimination

Voskuil asserts that she merely alleges a "garden-variety" claim of discrimination. *Petition*, p. 10. Voskuil further denies alleging severe, on-going emotional distress, an independent claim for emotional distress or placing her medical condition at issue. *Petition*, pp. 4, 10. However, Voskuil comes to the legal conclusion that she suffered depression *as a result* of being sexually harassed, abused and discriminated against by her supervisor. *Petition*, p. 3. The following facts establish that the foregoing statements are misleading, inaccurate and erroneous.

1. *Voskuil's Physicians.*

a. *1982 - 1983 Undisclosed Physician.* During Voskuil's deposition she testified that the first time that she could recall having depression being a part of her daily life was when she was at the University of Texas in 1982-1983. R. 995,

1005:6-12. Voskuil sought medical treatment and received prescription drugs for her condition with an undisclosed physician. R. 1005:13-18. Voskuil decided to leave the University of Texas and return to Dallas because she got very depressed, felt really sad and wasn't happy with the program. R. 1002:10-1003:4. Voskuil's definition of this depression included feelings of hopelessness, unhappiness and that she was very miserable and things had to change. R. 1003:17-25; 1004:8-11.

b. *November 1992 - Dr. Khatami.* The next time Voskuil recalls being influenced by depression was after Voskuil returned from St. Louis and began working for Maritz Travel in 1992. R. 995, 1006:19-25. This second episode of depression also occurred prior to her commencement of part time work at EHC. R 1007:1-11. Voskuil sought medical treatment and received prescription drugs for a diagnosis of clinical depression from a Dr. Khatami in or about November 1992. R. 1008:23-1009:8; 1010:11-1011:13; 1018:18-24; Voskuil estimates that over a period of a couple of months, she saw Dr. Khatami for between 12-20 appointments. R. 1020:4-11.

c. *1992, 1995 - Present, Dr. Shelley Roatan* Voskuil received medical treatment including prescription drugs for depression from Dr. Roatan during at least two separate periods. Voskuil first sought medical treatment from Dr. Roatan at the time she was receiving treatment from Dr. Khatami. R. 1017:19-22; 1018:13-17. Voskuil changed medical plans and returned to Dr. Roatan in 1995 to the present date. R. 1017:19-1018:17; 1021:15-16. Dr. Roatan has prescribed drugs in treatment of her clinical depression. R. 1021:5-9.

2. *Evidence Obtained During Discovery of Documents Concerning Voskuil's Mental Condition.*

Discovery has revealed a history of mental disorders which existed long before her employment at EHC. As discussed

above, Voskuil first sought medical treatment for depression in 1982-1983, ten years **prior to** her employment at EHC. Voskuil suffered a second episode of depression **prior to** her employment at EHC. Voskuil has admitted in a Patient History form to her employment application at EHC that **prior to** her employment at EHC she suffered from depression, anxiety and had been under psychiatric care. R. 1571, 1718. In an Application For Disability Benefits dated March 30, 1995 (the "Application") produced by Voskuil during discovery and introduced into evidence at the Texas Employment Commission ("TEC") administrative hearing, Voskuil admitted to a similar condition as recently as November 1992, *four months prior to her employment at EHC*. R. 1571, 1720 Line 11; R. 995, 1034 Line 11. Voskuil also admitted that her illness *was not related to her occupation*. R. 1034, Line 7. Her physician lists her diagnosis as "*Major Depression, Recurrent*" and admits that *her disability was not caused by Voskuil's current or prior employment*. R. 1035, Line 2 and 1(d).

From December 28, 1994 through March 27, 1995, Voskuil was on medical leave pursuant to the Family and Medical Leave Act ("FMLA"). R. 1663. Correspondence from her psychiatrist states this medical leave was required due to a "*Major Depressive Disorder*" with symptoms including "severe anxiety, feelings of depression, crying, poor concentration, discouragement, lack of satisfaction in life, self-criticism, suicide thoughts, irritability, difficulty in making decisions, fatigue and loss of appetite." R. 1571, 1719. Her physician further stated that "our efforts to find an appropriate anti-depressant medication have not yet been adequately successful." *Ibid.*

3. *Voskuil's Pleadings And Discovery Responses Placed Mental Condition at Issue.*

The Magistrate Judge specifically made findings, reviewed and affirmed by the District Court and the Fifth Circuit, that Voskuil's mental condition has been placed at issue by her pleadings and discovery responses, including, without limitation, that: (a) "[a]s a result of the hostile environment, Plaintiff suffered an extreme episode of depression, and was at the point of committing suicide" R. Vol. 9, p. 41:21-25 citing Voskuil's complaint – R. 435, 439 § 31; (b) Voskuil was required to receive counsel from a therapist and took a medical leave from EHC because of the intensity of the depression (R. Vol. 9, p. 41:25-42:3 citing Voskuil's complaint – R. 435, 439 § 32-33; (c) "[in] December of 1994, as a result of the harassment, I became severely depressed and for health reasons took a leave of absence," Vol. 9, p. 42:3-42:1 citing Voskuil's Interrogatory Answers Nos. 2, 3, 6, 7, 16, 18, 20 – R. 1646, 1654-1663; (d) in response to an interrogatory concerning "any severe emotional distress allegedly caused by Defendants' conduct" Voskuil stated "as a result of the harassment and hostility I had become severely depressed and was having suicidal thoughts and had decided that my life was not worth living if I had to face that type of abuse each day," Vol. 9, p. 42:3-42:10 citing Voskuil's Interrogatory Answers No. 21 – R. 1646, 1708-1709; (e) Voskuil requested actual damages as front pay for essentially the rest of her life until the age of 72 which would be in 2027 (Voskuil's complaint – R. 435, 449-450 § 80; and (f) Voskuil claimed entitlement to exemplary/punitive damages for Defendants' intentional conduct" (R. 435, 446-448, 450 §72, 76 and 81).

4. *Voskuil Introduced Medical Evidence As a Sword In Administrative and Legal Hearings While Asserting Psychotherapist Privilege As a Shield.*

In addition to waiving the psychotherapist privilege by the allegations in her pleading, Voskuil waived the privilege by actually introducing privileged information and evidence as a sword during: (a) summary judgment proceedings; (b) at prior administrative hearings before the TEC; and (c) by citing such evidence in her Appellant's Brief. Voskuil admitted she saw both a psychiatrist and a therapist for depression on or before November, 1992, four months **prior** to her employment at EHC. R. 552, 572, para. 136-37. Voskuil concluded that the **causation** of her depression in or about November, 1992 was: (i) a medical illness and related treatment and pain suffered on a prior job; (ii) the death of her grandparents; and (iii) her inability to work consistently. R. 552, 585, para. 131-136, 212. Even after Voskuil recovered from her medical illness, the depression had not lifted. R. 572, para. 137. In November 1992, Voskuil's "therapist recommended a psychiatrist who would be able to prescribe medication for my depression." R. 572, para 137-38. Voskuil described how the subjects of her counseling sessions shifted from her depression as a result of her medical condition and other "pedestrian issues" to "primarily dealing with coping with my job." R. 565, para. 89. Voskuil had **ongoing** psychotherapy since at least prior to November 1992 (not including the prior episode in 1982-1983). R. 565, 572, 584-85, para. 89, 137, 138, 205-6, 207. In November 1992, **prior to** her employment at EHC, Voskuil was prescribed medication for anxiety and depression. R. 573 and 585, para. 139, 213.

In December 1994, Voskuil became "severely depressed and was having suicidal thoughts and had decided that my life was not worth living." R. 573, para. 140. Voskuil concluded that the causation of this depression was her employment at

EHC. *Ibid.* Voskuil wrote in her journal: "I felt it would be better to die than to continue to live like I was — dead" . . . "I wanted to buy Final Exit on the way home . . . just ready to end the waste, the sadness, the loss, the torture, I thought I'd have enough pills to do it — I wanted to — I meant to." R. 634. By December 28, 1994 "I became convinced that death was a viable alternative to returning to work." Voskuil concluded "I was unable to return to work due to the depression." R. 573, para. 141.

On January 3, 1995, Voskuil requested leave under the FMLA "for a period to be determined by my physician." R. 633. Voskuil periodically notified EHC of her physician's prognosis of her **ongoing** condition and her anticipated return to work, including letters and prescription pad memos from Dr. Statman dated January 3, January 31, February 28, March 29, April 10 and May 26, 1995, which were introduced by Voskuil as exhibits at the TEC administrative hearings. R. 995-996, 1028-1033, 1037. On March 21, 1995, Voskuil advised EHC that "[p]revious conversations with my doctor have indicated that I will begin by working part time (half days) and those should be afternoons." R. 638. Voskuil stated that her physician had only "released me to four hours of work per day." R. 577, para. 163. At the expiration of Voskuil's statutory 12 week leave under the FMLA, Voskuil concluded, based apparently upon her physician's prognosis, that "I could not immediately return to an eight hour work-day." R. 578, para. 171. Voskuil concluded, based upon her physicians prognosis, that "I had not been released to work for more than four hours per day" and "I could not . . . take the position as offered." R. 579, para. 175. On April 10, 1995, Voskuil's physician and psychiatrist Dr. Statman wrote a letter delivered to EHC describing her prognosis and stating that Voskuil "has my permission to return to work 6 hours per day as of Wednesday, April 12, 1995." R. 649.

Voskuil concluded that the causation of her "extreme anxiety" was the level of harassment at EHC. This extreme anxiety required increased amounts of prescribed medication which she was required to continue to take for extended periods. R. 584-586, para. 205, 214. Presumably at her physician's direction, Voskuil "required increased therapy to deal with the anxiety and harassment issues." R. 585, para. 206. Voskuil had an ongoing psychiatric condition since Voskuil stated "I need to continue therapy, but currently am financially not capable", more than 22 months after her resignation at EHC. R. 585, para. 208. Voskuil's then present need for ongoing therapy had spanned a period of at least 4 years and 4 months, November 1992 through February 1997 (not including the prior episode of depression in 1982-1983). At the TEC administrative hearing, Voskuil introduced the Application, wherein Voskuil admitted her illness was not related to her occupation, her physician admitted that her disability was not caused by Voskuil's current or prior employment and her physician listed her diagnosis as "Major Depression, **Recurrent**." R. 995-996, 1034-35.

Voskuil used the foregoing evidence concerning the nature, extent, history and causation of Voskuil's medical condition as a sword to establish unusually severe, ongoing mental injury and psychiatric disorder.

B. This Is Not a Case In Which Voskuil Simply Stood In Contempt To Preserve the Psychotherapist Privilege.

Voskuil repeatedly claims that she utilized the proper procedures in good faith to simply stand in contempt in order to consistently claim and preserve her legally justifiable psychotherapist privilege through the appellate process. *Petition*, 5-6, 14-18.

In fact, Voskuil was sanctioned by the District Court because she exhibited a pattern of misconduct, made intentional

and willful misrepresentations designed to mislead the District Court, and was deliberately evasive, disobedient and disrespectful to the Court and opposing counsel as described below.

After the District Court affirmed the Magistrate Court's order compelling production of Voskuil's psychotherapist records, Voskuil allowed all applicable time periods to immediately reconsider or appeal that order expire. R.Vol. 10, p. 11:12-24; 35:10-17. Voskuil knowingly and intentionally decided to forego an appeal by mandamus of the District Court Order signed February 24, 1999 and willfully and intentionally failed to comply with such order. R. Vol. 10, p. 8:16-10:18; 15:7-16:8; 16:8-17:6; 77:15-78:1.

The transcript of the hearing of Defendant's Motion for Contempt and Sanctions on April 23, 1999 establishes that Voskuil and her attorney admitted they had disobeyed the District Court Order signed February 24, 1999. R. Vol. 10, p. 8:16-10:18; 77:15-78:1. The District Court made repeated inquiries as to whether Voskuil and her attorney intended to continue to willfully disobey the Court's orders in the future and refuse to produce the requested discovery including: (i) at least 7 inquiries made directly to Ms. Nadine King-Mays, the attorney for Voskuil; R. Vol. 10 p. 11:12-11:19; 13:19-14:8; 15:8-15:12; 16:8-16:10; 16:15-16:6; 16:20-16:21; 17:1-17:3; and (ii) at least seven 7 additional inquiries were made directly to Voskuil. R. Vol. 10, p. 17:7-17:22; 19:21-19:22; 19:25; 20:2-20:3; 20:6-20:8; 20:10-20:15; 20:20-21:7.

Ms. King-Mays initially unequivocally refused to comply with the Court's order. R. Vol. 10, p. 16:8-16:14; 16:15-16:19; 16:20-17:6. Voskuil, agreed with her attorney and also unequivocally refused to comply with the Court's order. R. Vol. 10, p. 17:7-18:13; 19:21-19:24; 19:25-20:1; 20:6-20:9; 20:12-20:17; 21:6-21:10. The District Court repeatedly

admonished Voskuil and her attorney for their contempt of Court and warned Voskuil that her case would likely be dismissed with prejudice if she failed to comply with the Court's orders. R. Vol. 10, p. 13:19-14:9; 15:8-15:12; 20:2-20:5; 36:22-37:16; 42:18-42:23.

The District Court repeatedly explored whether lesser sanctions, other than dismissal, would be effective and whether Voskuil would comply with the Court's orders if restrictions, in the nature of a confidentiality/protective order, were added to the Court's order. R. Vol. 10, p. 24:14-24: 20; 33:25-34:6; 36:22-37:16; 42:18-42:23; 42:25-43:4; 43:23-44:5; 46:22-47:8; 48:4-48:8; 58:7-58:11; 58:16-58:22. Initially, Voskuil gave evasive, incomplete answers as to whether she would comply if a confidentiality/protective order were added to the District Court's order. R. Vol. 10, p. 24:21-25:16; 34:6-34:8; 37:17-38:13; 43:5-43:22; 44:4-44:5; 47:2-47:9; 48:9-48:17.

The District Court informed Voskuil and her attorney that although the Court had determined that dismissal with prejudice of Voskuil's lawsuit was entirely appropriate, the Court would take a brief recess to allow Voskuil and her attorney one last opportunity to mitigate their contempt by agreeing to comply with the Court's orders. R. Vol. 10, p. 42:14-48.3. After the recess, Voskuil clearly and unequivocally agreed to obey the District Court's orders and produce the requested documents and information if the Court added the restrictions in the nature of a confidentiality/protective order outlined by the Court. R. Vol. 10, p. 48:3-48:8;58:7-58:15; 58:16-59:2; 75:15-75:19.

The District Court found that Voskuil was at fault for failing to timely raise or argue that a confidentiality/protective order should be added to the Court's order. R. Vol. 10, p. 49:5-57:19; 60:10-61:24. Voskuil had never previously offered to settle the controversy by proposing a confidentiality/protective order as a compromise. Voskuil had previously unequivocally refused to produce the documents and information. R. Vol. 10, p. 65:17-71:24.

The District Court outlined Voskuil's prior misconduct which included evidence that: (i) Voskuil had repeatedly failed to comply with the Court's orders; (ii) Voskuil's attorney had previously been sanctioned by the Magistrate Court for filing a frivolous motion; and (iii) Voskuil had been dilatory in filing pleadings on 10-12 occasions. R. Vol. 10, p. 41:14-42:12; 82:10-82:17. The District Court characterized Voskuil's conduct as deliberately evasive, disobedient and disrespectful toward the court and opposing counsel. R. Vol. 10, p. 34:20-34:25; 37:6-37:16; 67:6-67:8; 67:11-68:3; 68:13-68:23; 70:1-70:6; 73:15-73:18; 77:19-77:22; 82:10-82:17; 86:15-87:22.

On June 14, 1999, the District Court granted EHC's Motion for Contempt and Sanctions, held Voskuil and her attorney in contempt of court and again ordered Voskuil to answer and produce the requested discovery. R. 1377, 1382-83. The District Court found:

> (a) Plaintiff's counsel stated on the record that she did not plan to comply with the court's orders requiring production.
>
> (b) Voskuil confirmed that she had not complied with the Court's Order and "did not adequately justify her failure to do so, and presented no other relevant defense for her failure to comply."
>
> (c) "Although there is a clear record of contumacious conduct on the part of Plaintiff and her counsel, *and dismissal of this action with prejudice is justified*, the court will not impose such a draconian remedy" since "*lesser sanction will obtain compliance.*"
>
> (d) "Plaintiff and her counsel have agreed to produce the documents as long as disclosure of the documents is reasonably limited."

> (e) Voskuil was at fault for failing to timely raise or argue that a confidentiality/protective order should be added to the Court's order since the issue was first raised by the Court. R. 1378-80.

The District Court ordered as follows:

> Plaintiff and her counsel shall produce the documents in question and otherwise comply with the orders previously entered by the United States Magistrate Judge and this court by June 22, 1999, and Plaintiff and her counsel shall pay the monetary sanction to Defendant by July 11, 1999. If Plaintiff fails to comply with the court's order regarding either of those dates, Plaintiff's claims *will be dismissed with prejudice*. R. 1383.

The District Court further held that the assertion of a psychotherapist privilege by Voskuil's physician as opposed to Voskuil herself, which was filed 2 1/2 years after the deadline to object to EHC's discovery requests, was filed "far too late and is therefore waived." R. 1379.

Despite the repeated promises made by Voskuil and her attorney during the hearing on April 23, 1999, both failed to comply with the District Court's June 22, 1999 deadline to produce the relevant documents and answer the subject interrogatories and the July 11, 1999 deadline to pay the monetary sanctions ordered by the Court. Petition, p. 7. Due to the failure of Voskuil and her attorney to produce the requested discovery and pay the monetary sanctions imposed by the Court, EHC filed Defendant's Motion to Enforce Contempt Sanctions and Brief on June 28, 1999. R. 1399. On July 1, 1999, Judge Lindsay signed an Order of Dismissal and Judgment dismissing Voskuil's lawsuit with prejudice. R. 1410.

REASONS FOR DENYING THE WRIT

I. The Courts Below Correctly Applied the Correct Analysis on Waiver of the Psychotherapist/Patient Privilege (Question Presented No. 1)

Voskuil has waived the psychotherapist privilege recognized by this Court in *Jaffee* and its progeny by placing her mental condition at issue in her pleadings, discovery responses and the introduction of evidence as both a sword and shield during judicial and administrative proceedings. This is not a "garden variety" Title VII claim for emotional damages. Voskuil has admitted to a preexisting mental condition, diagnosed as "Major Depression, *Recurrent*" which spanned over 15 years, including in 1982-1983 and then again at least four months *prior* to her employment at EHC. Voskuil is not alleging (and the evidence does not show) the expected mental injuries customarily associated with sexual harassment claims, but rather, concerns extreme episodes of depression, thoughts of suicide and an inability to work for the rest of her life. EHC was entitled to discover the nature, extent, history and causation of Voskuil's alleged disability and damages.

In *Jaffe v. Redmond*, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (U.S. Ill. 1996), the Supreme Court recognized for the first time a psychotherapist-patient privilege in certain situations. *Jaffe*, as cited by the Magistrate Court, concludes "[w]e hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Civil Evidence." *Jaffe* at 1931, cited at Vol. 9, p. 39:17-23. The Magistrate Court clearly ruled in EHC's favor based not upon the existence or non-existence of the psychotherapist privilege, but rather based upon a finding of a *waiver* of the privilege, assuming it exists. Vol. 9, p 40:4-8. *Jaffe* recognized that the psychotherapist privilege, like any

other privilege, may be waived. *Jaffe*, at 1931 n.14. Unfortunately, *Jaffe* offered little guidance on the situations in which a patient may waive the psychotherapist privilege since it determined that it was neither necessary nor feasible to delineate the full contours of the newly recognized privilege.

Post-*Jaffe* caselaw, and the Magistrate Court, in findings reviewed and affirmed by the District Court and the Fifth Circuit, have expressly held that the psychotherapist privilege may be waived when a patient places his medical condition at issue. *See* R. Vol. 9, p. 40:4-44:22 wherein the Magistrate Court relies upon five post-*Jaffe* cases, including *Lanning v. Southeastern Penn. Transp. Auth.*, 1997 WL 597905 (E.D. Penn.); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Penn. 1997); *Kerman v. City of New York*, 1997 WL 666261 (S.D. N.Y.); *Doolittle v. Ruffo*, 1997 WL 151799 (N.D. N.Y.); and *Vann v. Lone Star Steakhouse and Saloon of Springfield, Inc.*, 967 F. Supp. 346, 350 (C.D. Ill. 1997). These post-*Jaffe* cases were the genesis of the broader view of waiver identified in Voskuil's First Question Presented. As discussed in paragraphs IV.A-C below, this broader view of waiver, rather than the more narrow view of waiver proposed by Voskuil, has been accepted by almost all of the courts which have considered the issue.

The most often cited case interpreting *Jaffe* and the broad view of waiver is *Sarko*, which identifies the following 4 methods of placing mental condition at issue:

(1) pleading a tort claim for emotional distress;

(2) *alleging a severe ongoing mental injury or psychiatric disorder*;

(3) offering expert testimony to support the claim; or

(4) when the plaintiff concedes his mental condition is in controversy (emphasis added).

Sarko, 170 F.R.D. 127, 130. *Sarko* emphasized that the plaintiff's allegations "that her depression has had a long term impact on her mental state" met the second category of cases in which a party places her mental condition in controversy. *Sarko* at 131. "[A]llowing a plaintiff to hide . . . behind a claim of privilege when that condition is placed directly at issue in a case would be simply contrary to the most basic sense of fairness and justice." *Vann* at 350 citing *Sarko* as persuasive.

In *Lanning*, the court considered similar categories of cases in which a plaintiff puts her mental condition at issue. The plaintiffs: (1) stipulated that plaintiffs would not seek damages for psychiatric/psychological injury; (2) stipulated that they would not offer expert testimony in support of their claim for emotional distress; (3) did not seek recovery for treatment of emotional distress; and (4) did not allege an independent tort-like action. Nevertheless, the court, citing *Sarko*, held that plaintiff can still attempt to establish plaintiff's emotional distress claim *through plaintiff's own testimony* so that the defendant "has a right to inquire into Plaintiff's pasts for the purpose of showing that their emotional distress was caused at least in part by events and circumstances that were not job related." *Lanning* at *2. The Magistrate Court adopted this finding and the District Court and Fifth Circuit reviewed and affirmed. R.Vol. 9, p. 44:7-12.

Voskuil, in addition to proposing a narrower view of waiver of the psychotherapist privilege, also attempts to differentiate her case by characterizing her claim as a mere "garden-variety" Title VII action. *Petition*, p. 9-10 citing *Sabree v. United Brothers of Carpenters & Joiners* 126 F.R.D. 422 (D. Mass. 1989). Clearly, Voskuil's assertion that she has removed all claims based upon emotional distress, psychic injury or

psychiatric disorder or severe, ongoing emotional distress is disproved by her own pleadings as detailed in paragraph A of the Statement of the Case. Voskuil is not alleging (and the evidence does not show) the expected mental injuries customarily associated with sexual harassment claims, but rather, her pleading refers to extreme episodes of depression, thoughts of suicide and an inability to work for the rest of her life. The evidence detailed above confirms multiple, pre-existing mental episodes and diagnosis of *recurrent* major depression, which may cause or contribute to Voskuil's injuries. This is not the type of "garden variety claim" with the alleged "emotional damages naturally flowing from that injury." *Sabree*, 126 F.R.D. 422, 426. Even *Sabree* concedes that there may be cases where an employee waives the psychotherapist privilege and places her mental condition at issue. *Sabree*, 126 F.R.D. 422, 426. EHC does not dispute that the cases are legion that suggest, as in *Sabree* that the employer is not entitled to discovery of medical records in a "garden variety" Title VII claim. However, the Magistrate Court made findings, reviewed and affirmed by the District Court and Fifth Circuit, which distinguish this case from a "garden variety" Title VII case. R. Vol. 9, p. 38:4-48:20;

II. The Courts Below Did Not Abuse Their Discretion (Question Presented No. 2)

Voskuil's Second Question Presented does not present any new, independent considerations governing Supreme Court certiorari review other than whether the Courts below abused their discretion in holding that the federal psychotherapist privilege, referenced in the First Question Presented, had been waived.

Voskuil's statement on p. 13 of her Petition that the applicable standard of review should have been a *de novo* standard of review, rather than an abuse of discretion standard

of review, conveniently ignores the fact that this is an appeal of a case dismissed with prejudice as a result of sanctions imposed by the District Court. "A district court's decision to dismiss a complaint with prejudice as a sanction for violation of a discovery order may be reversed only if it amounts to an abuse of discretion." *Prince v. Poulos*, 876 F.2d 30, 32 (5th Cir. 1989) citing *NHL v. Metropolitan Hockey Club, Inc.*, 96 S. Ct. 2778, 2780-81 (1976). The issue is not whether the reviewing court would have imposed the same sanctions as did the district court; the question is whether the district court abused its discretion in so doing. *NHL*, 96 S. Ct. 2778, 2780.

The underlying discovery order was an appellate review by the District Court of Voskuil's objections to a *nondispositive* pretrial discovery order of a U.S. Magistrate Judge pursuant to F.R.C.P. 72(a) and 28 U.S.C. § 636(b)(1)(A). F.R.C.P. 72(a) provides that a "district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be *clearly erroneous or contrary to law*." (emphasis added). *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995). "A factual finding is not clearly erroneous unless although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *RTC v. Sands*, 151 F.R.D. 616, 619 (N.D. Tex. 1993). The *de novo* standard of review *does not* appear anywhere in F.R.C.P. 72(a) as Voskuil incorrectly suggests. Voskuil mistakenly cites the *de novo* standard of review which is reserved for *dispositive* magistrate rulings under F.R.C.P. 72(b). The District Court itself made a finding, citing *Castillo*, that the magistrate's order was on a *nondispositive* pretrial matter, a finding which Voskuil did not challenge by point of error in either the Fifth Circuit or this Court. R. 1292. Voskuil is not entitled to review of arguments and evidence not seasonably raised before the magistrate, the district court or the Fifth Circuit. *Baker v. Ace Advertisers Service*, 153 F.R.D 38, 43 (1992).

Even if the proper standard was a *de novo* review, the District Court emphatically denied Voskuil's allegations on page 13 of her Petition that the District Court failed to give serious consideration or perform a thorough review of the objections, evidence, record, and other pleadings. R. 1408-1409; 1410 at 1411. The District Court specifically found, and the Fifth Circuit affirmed, that the District Court considered the "motions, responses, replies, oral argument of counsel, comments of the Plaintiff (i.e. testimony) and the applicable law." R. 1377, 1292; Vol. 10, p. 2:19-23.

The "review of a district court's sanction for the violation of one of its discovery orders also, necessarily involves a review of the underlying discovery order". *F.D.I.C v. Connor*, 20 F.3d 1376, 1381 (5th Cir. 1994). However, the appellate court "review of the underlying discovery order is deferential; [t]he trial court's exercise of discretion regarding discovery orders will be sustained absent a finding of abuse of that discretion to the prejudice of a party." *Ibid.*

III. The Courts Below Correctly Held That Voskuil Was Not Legally Justified In Resisting Discovery And Seeking Appellate Review (Question Presented No. 3)

The Third Question Presented by Voskuil, again, does not present any new, independent considerations compelling Supreme Court certiorari review other than whether Voskuil was legally justified, based upon the psychotherapist privilege identified in Voskuil's First Question Presented, in resisting discovery and seeking appellate review. As discussed in the Statement of the Case, para. B. above, this is not a case in which Voskuil simply stood in contempt of Court to preserve the psychotherapist privilege.

The District Court correctly held, and the Fifth Circuit affirmed, that a party seeking to establish a civil contempt need only evidence: (1) that a court order was in effect; (2) that the

order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order." *Petition App.*, p. 19-20 citing *FDIC v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995). Voskuil has conceded that this Fifth Circuit standard was met since Voskuil and her attorney admit that they disobeyed the District Court Order signed February 24, 1999. R. Vol. 10, p. 8:16-10:18; 77:15-78:1.

F.R.C.P. 37(c) specifically authorizes dismissal as an appropriate remedy for disobedience of court discovery orders. Dismissal of Voskuil's claims was especially appropriate based upon the Court's mandatory warning and order that in the event Voskuil and her attorney failed to pay the monetary sanctions and comply with the discovery orders, "Plaintiff's claims *will be dismissed with prejudice*." R. 1383. *NHL*, 96 S. Ct. 2778, 2780.

The District Court found, and the Fifth Circuit affirmed, that Voskuil and her attorney willfully and intentionally misled the District Court as to their intentions to comply with the Court's orders and no less drastic sanctions would likely result in compliance. During the hearing on April 23, 1999, both Voskuil and her attorney were informed that the Court had determined that "death penalty" sanctions in the nature of a dismissal of Voskuil's lawsuit with prejudice were appropriate. R. 1379-80. However, in an effort to comply with the Court's duty to explore whether the deterrent value of the proposed sanctions could be substantially achieved by less drastic sanctions, the District Court proposed, and Voskuil and her attorney clearly and unequivocally agreed, that the documents and information be produced subject to a Court ordered confidentiality/protective order designed to shield sensitive documents from unnecessary disclosure. R Vol. 10, p. 48:3-48:8; 58:7-58:15; 58:16-19:2; 75:15-75:19.

The District Court signed its Memorandum Opinion and Order which held that "[a]lthough there is a clear record of contumacious conduct on the part of [Voskuil] and her counsel, and dismissal of this action with prejudice is justified, the court will not impose such a draconian remedy" since "a lesser sanction will obtain compliance." R 1379-80. Relying on Voskuil's promises, the Court outlined the "lesser sanction" than dismissal which it had decided to impose ie. the production of the documents and information subject to the proposed confidentiality/protective order R. 1380-81.

Despite the assurances that Voskuil and her attorney had made during the hearing, Voskuil subsequently refused to produce the subject documents and information. Voskuil never objected to or assigned error to the wording of the proposed confidentiality/protective order or the Memorandum Opinion and Order ordering production, nor did Voskuil ever give the Court any additional explanation for Voskuil's refusal to abide by the concessions made in open court. As more fully discussed in paragraph IV.E. below, Voskuil failed to properly raise, perfect and preserve her present claims of an inability to pay the monetary sanctions. Voskuil was offered, but unexplainably rejected the "less drastic sanction" proposed by the District Court. Therefore, the deterrent value of F.R.C.P. 37 could not be achieved by less drastic sanction than dismissal.

IV. Other Considerations Justifying Denial of the Petition

A. Certiorari Should Be Denied Since There Is No Conflict Among The Circuit Courts of Appeal

Voskuil's petition for writ of certiorari should be denied for the reason that there is no conflict among the Circuit Courts of Appeal on the questions presented. In Voskuil's First Question Presented, Voskuil asserts that there is a "conflict between the circuits regarding what constitutes a waiver of the psychotherapist/patient privilege under *Jaffee v. Redmond*."

However, Voskuil fails to cite even a single Court of Appeals case regarding waiver of the psychotherapist privilege by a patient placing his or her medical condition at issue. Supreme Court Rule 10(a), which lists certain considerations governing the decision to grant review by writ of certiorari, provides that [r]eview on a writ of certiorari is not a matter of right, but of *judicial discretion*" and "will be granted only for *compelling reasons*" such as "(a) a *United States court of appeals* has entered a decision in conflict with the decision of another *United States court of appeals* on the same important matter." (emphasis added). Since Voskuil has cited only federal district court cases, Voskuil can not meet the standard of Supreme Court Rule 10(a). In fact, research by EHC's counsel has discovered only a single Court of Appeals case interpreting the waiver of the *Jaffee* psychotherapist privilege by a patient placing his or her mental condition at issue discussed in paragraph IV.D.2. below. *See Schoffstall v. Henderson*, 223 F.3d 818, 822 (8th Cir. 2000).

B. The Alleged Conflict Between The Circuits Results From a Single Massachusetts District Court

On page 11 of her Petition, Voskuil claims that developing case law focuses on two divergent views with regard to the psychotherapist privilege. Voskuil identifies a broader view (represented by *Sarko* and *Vann* cited by the Magistrate Court below) and a narrower view which Voskuil states is represented by three cases. Only one of these cases actually adopts the narrower view recommended by Voskuil. *See Vanderbilt v. City of Chilmark*, 174 F.R.D. 225, 229-230 (D. Mass. 1997) — plaintiff only waives psychotherapist/patient privilege by introducing evidence (by witness or testimony) regarding the substance of her conversations with her psychotherapist in order to further her claim of emotional damage.

The second cited opinion, which was issued by a magistrate court, was subsequently modified by a reviewing California district court and declines to follow the narrower view identified in *Vanderbilt*. *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D. Cal. 1999), *opinion modified by*, 196 F.R.D. 562, 565-568 (S.D. Cal. 1999). The district court in *Fritsch* held that the narrower view in *Vanderbilt* is unfair because the defendants should have access to evidence and explore the possibility that plaintiff's emotional state was caused by other factors in her life at the time. *Fritsch*, 196 F.R.D. 562, 569. The district court in *Fritsch* "concludes that the Supreme Court would adopt the broad view of waiver." *Fritsch*, 196 F.R.D. 562, 568.

The final opinion cited by Voskuil also, in fact, declines to follow the *Vanderbilt* narrower view and instead adopts the broader view applied by the Magistrate Court below. *Jackson v. Chubb Corporation*, 193 F.R.D. 216, 224-225 (D. NJ. 2000) — "[h]aving closely reviewed cases supporting both the broad and narrow views on waiver, this Court is convinced that the broad view of waiver best serves the respective interests of the parties to a lawsuit."

The basis of Voskuil's alleged "conflict among the circuits" is therefore reduced to a single Massachusetts District Court case which has been harshly criticized and distinguished as discussed below. The national impact of denying Voskuil's petition for writ of certiorari would be limited to a single Massachusetts district court, certainly not an intolerable conflict which requires immediate resolution by this Court. The Courts of Appeal, not the Supreme Court, have the duty to maintain uniformity within their respective circuits and to supervise the decisions of the various district courts therein. *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 634 (1957).

C. The Alleged Narrower View Identified In Vanderbilt Has Been Discredited

A Westlaw keycite check reveals that at least five cases have disagreed with the analysis in *Vanderbilt* and at least three cases have declined to follow *Vanderbilt*. Respondent, therefore, counts at least eight cases in just three years which have disagreed or declined to follow the single Massachusetts District Court in *Vanderbilt*. Therefore, to the extent there is a conflict among the circuits, which EHC denies, the conflict will likely be resolved as a result of future cases in the Courts of Appeals.

D. Supreme Court Consideration of This Evolving, Unsettled Area is Premature

1. *The Jaffee Case Was Decided Only Five Years Ago.*

This Court only recognized the psychotherapist privilege five years ago in *Jaffee*. The Court, at the time, noted that "it is neither necessary nor feasible to delineate its full contours in a way that would govern all conceivable future questions in this area. *Jaffee*, 518 U.S. 1, 18, 116 S. Ct. 1923, 1932. The foregoing statement is equally appropriate just five years later.

2. *Only a Single Circuit Court of Appeals, the Eighth Circuit, Has Even Reached the Question Presented by Petitioner.*

The only reported decision by a U.S. Court of Appeals on the question presented is *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) which held that the psychotherapist privilege is waived when a party places her medical condition at issue. *Schoffstall* cites the broader view of *Sarko* and *Vann* cited by the Magistrate Court below as persuasive. *Schoffstall* also cites, but disagrees with *Vanderbilt*, the case relied upon by Voskuil to promote a narrower view of waiver of the psychotherapist privilege. However, even the *Schoffstall* case devotes only a single paragraph to the resolution of this issue. Therefore, not even the Eighth Circuit has fully delineated the full contours of the psychotherapist privilege.

3. *Even the Decisions of the Courts Below Were Unpublished and/or Failed to Fully Elaborate and Develop Their Analysis of the Psychotherapist/ Patient Privilege.*

Neither the District Court nor the Fifth Circuit decisions below were designated for official publication. By failing to meet the criteria for publication pursuant to Rule 47.5.1 of the Fifth Circuit Local Rules, the Fifth Circuit determined that, among other things, the case did not: (i) in any way interest persons other than the parties to the case; (ii) create or resolve a conflict of authority either within the circuit or between this circuit and another; and (iii) concern or discuss a factual or legal issue of significant public interest. The entire Fifth Circuit opinion is only three pages long and the Fifth Circuit opinion, since unpublished, did not even attempt to fully elaborate, discuss and/or develop the legal issues involved in the case. In fact, the Fifth Circuit opinion does not cite a single case as precedent. This Court should avoid a premature adjudication of a question presented, especially when the Court is requested to review a new or novel question not yet fully addressed by the appropriate courts below. *Arizonans For Official English v. Arizona*, 520 U.S. 43, 78-79, 117 S. Ct. 1055, 1074 (1997).

4. *This Court Should Wisely Allow These Issues to Percolate In the Lower Courts And Be Resolved by Additional Courts of Appeal Before Granting Certiorari.*

A petition for writ of certiorari should be denied where the question requires "further study" in the lower courts "before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963, 103 S. Ct. 2438, 2439 (1983). To grant certiorari review of the Fifth Circuit decision would deprive this Court of potentially valuable discussion of these issues by lower courts. *United States v. Mendoza*, 464 U.S. 154, 160, 104 S. Ct. 568,

572 (1984) — this Court benefits from "permitting several Courts of Appeal to explore a difficult question before this Court grants certiorari." *See also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S. Ct. 965, 978 n.26 (1977) — this case "exemplifies the wisdom of allowing difficult issues to mature through full consideration by the Courts of Appeal."

E. Voskuil Failed to Properly Raise, Perfect and Preserve Her Claim of an Inability to Pay the Monetary Sanctions

Voskuil's petition for writ of certiorari should be denied because Voskuil failed to properly raise, perfect and preserve on appeal the alleged inability of Voskuil and her attorney to pay the monetary sanctions assessed against them by the District Court. *See, e.g., Silva v. Witschen*, 19 F.3d 725, 732-733 n.15 (1st Cir. 1994) "Inability to pay what the court would otherwise regard as an appropriate sanction should be treated as reasonably akin to an affirmative defense, with the burden upon the parties being sanctioned to come forward with evidence of their financial status." *White v. GMC*, 908 F.2d 675, 685 (10th Cir. 1990). If the contemptor offers no evidence as to her inability to comply or stands mute, she has not met her burden. *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995).

After the contempt hearing, Voskuil was given an additional opportunity to object to the attorneys' fees requested by EHC by affidavit, but again failed to raise Voskuil's and her attorneys' alleged inability to pay the monetary sanctions in her objections to imposition of monetary sanctions filed April 27, 1999. Similarly, Voskuil failed to challenge the reasonableness of EHC's attorneys' fees during the sanctions phase by offering expert testimony or other evidence refuting or contradicting the reasonableness of EHC's attorneys' fees. *Silva*, 19 F.3d 725, 732-733.

Finally, on June 21, 1999, almost two months after the original hearing of the motion for contempt and for sanctions, Voskuil filed a motion to stay pending Voskuil's application for writ of mandamus in which Voskuil briefly concluded that Voskuil and her attorney did not have funds sufficient to pay the monetary sanctions. R. 1390. However, Voskuil presented no evidence to the District Court of the financial condition of Voskuil and her attorney or of their inability to pay the monetary sanctions. *Silva*, 19 F.3d 725, 732-733 n.15. Conclusory statements by Voskuil in a single, unverified pleading are inadequate to carry her burden. *Huber*, 51 F.3d 5, 10. There is **no evidence in the record** which indicates or even suggests that either Voskuil or her attorney were unable to pay the monetary sanctions. *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 685 (8th Cir. 1997).

Subsequently, Voskuil failed to assign a point of error in her appeal to the Fifth Circuit asserting their alleged inability to pay the monetary sanctions. A question presented in a petition for writ of certiorari but not raised in the court of appeals is not properly before this court. *Delta Airlines v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146 (1981). Similarly, this Court should decline to consider questions presented in a petition for writ of certiorari that have not been addressed or considered by the lower courts. *Patrick v. Burget*, 486 U.S. 94, 99, 108 S. Ct. 1658, 1662 n.5 (1988). It would be improvident to grant Voskuil's petition for writ of certiorari since the evidentiary appellate record is undeveloped and insufficient to resolve the factual dispute concerning their alleged inability to pay. *Smith v. Legg*, 24 F.3d 650, 655 (5th Cir. 1994). *See Wainwright v. City of New Orleans*, 392 U.S. 598, 599, 88 S. Ct. 2243, 2245 (1968) — record described as "too sketchy" for consideration by writ of certiorari.

F. Certiorari Should Be Denied Because This Case Is Properly Decided on More Narrow Grounds Than the Psychotherapist Privilege

It is instructive that the Fifth Circuit did not even reach or discuss the question of the waiver of psychotherapist privilege below. Rather, the Fifth Circuit decided the case on more narrow grounds. The Fifth Circuit simply determined that the District Court did not abuse its discretion since: (i) Voskuil, *herself*, agreed to release the medical records; (ii) Voskuil had been warned that continued failure to produce the records would result in dismissal with prejudice; (iii) Voskuil twice intentionally disregarded the district court's orders; (iv) Voskuil misrepresented her future course of conduct to the district court; and (v) Voskuil was originally granted a lesser punishment than dismissal with prejudice but failed to comply with the district court's orders. Voskuil's petition for writ of certiorari should be denied since the Supreme Court is likely to decide the case on the narrower grounds used by the Fifth Circuit Court, rather than on the questions presented.

G. Certiorari Should be Denied Since this Case Presents No Compelling National Question

Voskuil's petition for writ of certiorari should be denied because the case presents questions of importance merely to the litigants and not an issue of immediate public significance, especially since: (i) Voskuil has failed to establish a conflict among the circuit Courts of Appeal; and (ii) the Fifth Circuit decided this case on narrow grounds not implicating the psychotherapist privilege. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79, 75 S. Ct. 614, 619-620 (1955). A writ of certiorari should be sparingly exercised with necessary restraint and caution based upon the considerations such as listed in Supreme Court Rule 10. *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 448-449, 79 S. Ct. 921, 928 (1959). Supreme Court

Rule 10 specifically requires that "a petition for writ of certiorari will be granted only for *compelling* reasons." This Court has recognized that

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Rice, 349 U.S. 70, 79, 75 S. Ct. 614, 619-620.

H. Voskuil's Petition for Writ of Certiorari Should be Denied Because it Turns Solely Upon an Analysis of the Particular and Unique Facts Involved

This case has already been decided adversely to Voskuil by three separate courts including the Magistrate Court, the District Court and the Fifth Circuit. As discussed above, Voskuil's petition relies upon many facts which are: (i) denied or in dispute by EHC; and (ii) in conflict with the fact findings by the Magistrate Court, which were affirmed by both the District Court and the Fifth Circuit. Supreme Court Rule 10 provides "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." "[A] Court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Goodman v. Lukens Steel Company*, 482 U.S. 656, 665, 107 S. Ct. 2617, 2623 (1987). The Supreme Court should not grant a petition for writ of certiorari to review evidence and discuss specific facts. *Texas v. Mead*, 465 U.S. 1041, 104 S. Ct. 1318, 1320 (1984). Certiorari should only be

granted when the record reveals that the facts appear with sufficient clarity to enable this Court to decide the question presented. *Gilbert v. California*, 388 U.S. 263, 269, 87 S. Ct. 1951, 1954 (1967).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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